AMERICAN BAR ASSOCIATION JOVRNAL

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OUR profession is devoted to the greatest thing in any civilized community—the administration of justice. The purpose of the community of lawyers is that the ordinary citizens shall always have at their disposal the man who can protect them, who can stand up before arbitrary power from whatever quarter it may come and assert the inalienable rights of the individual to the eternal freedoms . . . There are no fixed standards for forensic oratory, no patterns and no types to which the advocate must conform; but I have found that it is simple speech that makes the powerful appeal. Let your advocate be not merely a man of law—let him be a man of letters, with love of the humanities and the right use of words.

—From Sir Norman Birkett on "The Art of Advocacy" *(Page 4)*

Every Lawyer

Should read the annotations

. . . . "Joint and mutual wills," with practical suggestions and forms, 169 ALR 9.

. . . . "Effect of defective brakes on liability for injury," 170 ALR 611.

. . . . "Percentage leases," 170 ALR 1113.

These practical and timely topics are illustrative of the subject matter found in the fifteen thousand annotations in AMERICAN LAW REPORTS, in which all discoverable American and English cases are discussed which are directly in point on the question. • These annotations are easy to find by the use of the ALR digest system supplemented by its word index. • Investigate the easy way that you can acquire ALR. • Write either publisher.

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Keynote Message as to the American Patent System

Before the Section of Patent, Trademark and Copyright Law at our Cleveland meeting, William C. Foster, Under Secretary of Commerce, gave a notable message as to the large part which the American patent system has played in the development of American free enterprise, the opportunities and rewards of labor and small businesses, and the strength of American industry. He stated his deep conviction that it has been "an important civilizing force," but he outlined also some dangers and problems. Because the address is one which should interest all lawyers and their clients, not merely the specialists in patent law, we publish it substantially in full.

Roscoe Pound Continues His "Survey of The *Survey*"

The third installment of Dean Pound's incisive review of the *Annual Survey of American Law*, based on the 1944 volume, carries him into domains of private as well as public law. Some of the trends of judicial decision and legislation appear to him to be sound and salutary; others seem full of dangers. At several points he inveighs against the "unnecessary judicial creation of uncertainties".

"Decentralizing for Liberty" Is Reviewed in This Issue

Lawyers will do well to read the review, and then Tom Hewes' surefooted *Decentralizing for Liberty*. Walter Armstrong tells of Mr. Justice Holmes' letters to Dr. Wu and Simeon Strunsky's clever tale of *Two Came to Town*. Two important volumes dealing with vexing postwar problems—*Will Dollars Save the World?* and *A Report on Germany*—are reviewed. There is a grist of short notes about new "tools of our profession".

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The important basic document for all persons interested in international law will be, for several years, the Resolution of the General Assembly creating the International Law Commission and the Statute governing the Commission. The text is given, with comment on the significance of the action voted.

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For the first time since 1921 a term of the Supreme Court of the United States is in session without its opinions being reviewed for the JOURNAL by Edgar Bronson Tolman, late Editor-in-Chief Emeritus. This month's department, however, still bears the stamp of his workmanship; there is one review written by him before his death and the others were prepared under his editorship. The department will be continued in its present form at least until the meeting of the Board of Editors in Chicago in February.

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Belatedly because of the enforced reduction in our number of pages per issue (due to increased costs of printing and paper supply), the usual report of the proceedings of the House of Delegates during the 1947 Annual Meeting has not been published until this issue. Many of the actions voted had been reported separately in our November and December issues.

UNIVERSITY OF MIAMI'S

Third Annual Conference on Federal Taxation

J. K. LASSER, DIRECTOR

RONEY PLAZA HOTEL MIAMI BEACH, FLORIDA

APRIL 5-9

Lectures and Question and Answer Sessions Will Cover Each of These Important Tax Problems:

HOW TO START A NEW BUSINESS
The advantages or disadvantages of each of the forms; forms to be avoided in view of the penalties existing in parts of the law.

WHEN YOU SHOULD REVIEW THE METHOD IN WHICH A BUSINESS IS OPERATING
Methods to use in reorganization in order to obtain the best tax position and better financing.

HOW TO OPERATE A BUSINESS TO GET THE LOWEST TAXES
A study of sales, compensation, inventorying, depreciating, advertising, promotion, etc.

HOW TO BUY, SELL AND OPERATE PROPERTY
Subdivisions, buildings, apartments, hotels, and all other forms of real estate. A study of reducing the taxable income and securing the greatest tax deductions.

HOW TO BUY AND SELL SECURITIES
A study of timing, extending holding, short selling, trading with members of the family; tax free exchanges.

PLANNING FOR THE MINIMUM ESTATE TAXES DUE BY AN ESTATE
For greatest income during life and for heirs, avoiding double taxation. The making of gifts and creating trusts during life.

PLANNING FOR MINIMIZATION OF THE INDIVIDUAL'S TAX BURDEN
A study of compensation deferring plans; arranging for annuities; contributions; deductions for medical costs, joint tax returns, joint ownership of property, etc.

PROPOSALS THAT MAY COME BEFORE CONGRESS IN THE TAX LAWS
A review of the many changes suggested and what may be expected in a Congressional study of them.

LECTURERS: *Charles A. Morehead, J. S. Seidman, J. K. Lasser, Maurice Austin, Sydney A. Gutkin, Kenneth W. Gemmill, Carbery O'Shea, Adrian DeWind.*

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Supreme Court of the U.S. :

Amendments of the Constitution Are Proposed

▪ "One way to ward off an attack upon the Courts", reported a Committee of the Association of the Bar of the City of New York on December 9, "is to remove probable grounds of reasonable criticism of their present structure and operation". That Association's Special Committee on the Federal Courts had been created "to consider possible measures to forestall future efforts to invade the independence of the United States Supreme Court and the lower United States Courts". The Committee's proposals were, by way of constitutional amendment and by legislation, "to put into legally binding form some of the protective traditions surrounding the Supreme Court and the lower federal Courts".

The Association approved all but one of its Committee's proposals. This was voted after an animated debate and division at a regular meeting, the full text of the report and resolutions having been sent in advance to all members of the Association. The Committee asked for the leadership of the American Bar Association in support of the approved recommendations. Action by the House of Delegates on the subject is likely, at its mid-winter meeting on February 23-25. State and local Bar Associations, and individual members of our Association, owe it to our profession and to the American judicial system to study the proposals and make known their views to their representatives in the House of Delegates.

▪ At a well-attended regular meeting on the evening of December 9, the Association of the Bar approved recommendations by its Committee on the Federal Courts for the consideration of several amendments of the Constitution of the United States in respect of the Supreme Court and other federal Courts. The Association did not approve a Committee recommendation for a statutory enactment.

The Association's action was voted after an extended debate, in which Chairman Edwin A. Falls and Chauncey Belknap of the Committee argued for the recommendations and Whitney North Seymour and Nathan Phillips made the principal arguments in opposition. The debate was on a high level of patriotic consideration and interest. The full text of the Resolutions submitted (all of which were adopted except B—the last proposal) were as follows:

RESOLVED, that the Special Committee on the Federal Courts recommends the adoption of the following resolution by The Association of the Bar of the City of New York:

"RESOLVED, that the Association of the Bar of the City of New York sponsors the following measures:

A) The amendment of the Constitution of the United States to provide that:

1) The Supreme Court shall be composed of the Chief Justice of the United States and eight Associate Justices.

2) The Chief Justice of the United States and each Associate Justice of the Supreme Court shall retire at the end of the term of the Court during which he shall attain the age of seventy-five years.

3) Article III, Section 2 of the Constitution shall be amended so that the second paragraph (unnumbered) shall read as follows:

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all Cases arising under this Constitution the supreme Court shall have appellate Jurisdiction both as to Law and Fact.* In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." [New matter in italics.]

4) No person hereafter appointed Chief Justice of the United States or Associate Justice of the Supreme Court shall be eligible to the office of President or Vice President.

B) The enactment of a statutory provision to provide that:

1) No Chief Justice of the United States nor any Associate Justice of the Supreme Court nor any Judge of any other court of the United States shall during his term of office hold any other governmental or public office or position.

The Committee's "Notes" on the Wording of Its Amendments

The Committee's "annotations" as to the text of the amendments sponsored by it were as follows:

[The conventional capitalization of that period, which was used in the Constitution, has been followed in proposal A-3 because the new matter is to fit into an existing section. It has not been followed in the other proposals as it has not been followed in Amendments and particularly the recent ones. An effort has been made to adhere, as far as practicable, to the terminology and phraseology of the Constitution.]

2) The Committee at first was inclined to add a provision that, upon such automatic retirement at the age of seventy-five, the Justice should continue to receive the same salary that he was receiving immediately prior to such retirement, but there was recognized the possibility, however remote, that such appointments might be made of persons not much younger than seventy-five in order to give them the pension for the rest of their lives. The Committee is of the opinion that Congress should not be prevented from limiting the pension to Justices who have served at least a certain number of years on the Supreme Court. It was decided, however, that this entire matter of pension may be dealt with more appropriately by legislation than by a Constitutional amendment.

3) The Committee finally decided to use the phrase "In all Cases arising under this Constitution" because the phrase already appears in the Constitution, but the Committee had some slight misgivings because of the language in *Gully* v. *First National Bank in Meridian*, 1936, 299 U. S. 109 at 112; 81 L. Ed. 70 at 72, which since has been cited with approval. It should be noted that the *Gully* case itself and some of the others that cite it dealt with removal of a case from a state court. The Committee realizes that perhaps there would be less risk of misconstruction of the real intent if the phrase were cast as follows: "In all Cases involving the construction or application of this Constitution." If it is thought best to eliminate all possible doubt, the phrase might be enlarged to read: "In all Cases involving or claimed by any party thereto to involve the construction or application of this Constitution.

4) It seems clear from the Constitution itself that the term "appointed" embraces both the nomination by the President and confirmation by the Senate.

Grounds of the Committee's Considered Recommendations

In view of its importance to the profession and the public, we publish the following excerpts from the Committee's report:

Our Committee was appointed in November, 1946 to consider possible measures to forestall future efforts to invade the independence of the United States Supreme Court and the lower United States courts by a President or Congress seeking to nullify or impair the power of the judicial branch of the government. As there are many loopholes in the strict letter of the Constitution through which such a thrust might be made, the problem is whether some or all of those loopholes should be plugged up and, if so, how.

Another and a closely related function of the Committee is to consider whether or not there should be suggested any other changes that it is thought would tend to increase confidence in the independence and efficiency of the Federal courts.

Our Committee rendered an oral interim report at the Stated Meeting of the Association held on February 11, 1947 and the Annual Report sets forth its progress up to May, 1947. . . .

Our Committee has studied the subject for a year and during that time has conferred, individually and as a group, with authorities best qualified to shed light upon the problems involved.

The conclusions that it has reached are embodied in the proposed resolution.

In the first place, our Committee is of the opinion that measures should be taken, by Constitutional amendment and by Congressional enactment, to put into legally binding form some of the protective traditions surrounding the Supreme Court and lower Federal courts or to remove possible temptations to encroach upon their independence. One way to ward off an attack upon the courts is to remove probable grounds of future reasonable criticism of their present structure and operation.

In the second place, our Committee is convinced that, to be effective, whatever action is recommended by this Association should, so far as possible, be sponsored by the American Bar Association in order to make the movement a national one.

The specific Constitutional and statutory provisions contained in the proposed resolution speak for themselves but a few explanatory notes are appended to it.

Necessity of Taking Action To Safeguard the Independence of the Court

The attitude of this Association as expressed at the time of the Supreme Court-packing project of 1937 and the appointment of this Special Committee by the Executive Committee indicate that this Association has been aware of the necessity of taking action to safeguard the Court at a time when its independence is not imminently threatened rather than at the time when the next attack is launched. Our Committee has felt that it was part of its duty to give weight to the opinion held in some highly authoritative quarters that in this interlude of serenity the subject should not be stirred up. Our Committee has concluded, however, that whatever risk there may be in arousing a discussion is much more than offset by the risk of providing no additional safeguards until it may be too late. Furthermore, our Committee has confidence that, if proposals to protect the independence of the Supreme Court are carried into Congress and before the people under the leadership of the American Bar Association, the movement will be started cautiously under experienced leadership with all of the dangers carefully in mind.

It is hoped that the proposals themselves will be considered from a general point of view. No two lawyers would be likely to agree as to the exact measures or their exact phraseology. Even within the Committee there had to be considerable give and take on the details and we are confident that the spirit that resulted in this unanimous report will be reflected in the attitude of the membership of this Association as a whole.

In considering the problems and in drafting the proposals, not only have all political considerations been put aside but every effort has been made to allay any baseless suspicion that they have entered into the result. Our Committee also has tried to avoid dispensable controversial matter and to avoid complexity.

Our Committee asks you not to read the words of the resolution too meticulously. If success should be achieved and the ball should roll to its goal, it inevitably will undergo changes along the way. A good start already has been made, thanks to the cooperation of Mr. John G. Buchanan, Chairman, and the other members of the Special Committee on the Judiciary of the American Bar Association.

The Committee's report recognized frankly that proposals of such vital

consequence should not emanate from, and be sponsored principally by, the lawyers and Bar Associations of any one locality or region, but should finally reflect the considered judgment of the majority of lawyers in all parts of the country, under the leadership of the American Bar Association. On this aspect the Committee's report said:

> Our Committee has been in continuous contact with the American Bar Association Committee and these proposals that have been arrived at by our Committee were presented, informally and unofficially, to the American Bar Association Committee at a meeting held in Washington last June, with careful indication that the proposals had not yet been submitted to the membership of this Association. At the Annual Meeting of the American Bar Association held in Cleveland this September, Mr. Buchanan, in presenting the report of the Judiciary Committee to the House of Delegates, spoke of the movement that we have started here and promised that his Committee would report upon the subject to the House of Delegates at its mid-winter session. While neither this Association nor your Committee is seeking any credit and, on the contrary, is of the opinion that the movement should not be identified with any locality and particularly not with New York City, this Association will be interested to know that it was the only one mentioned by Mr. Buchanan in his report and seems to be the only one that is taking an active part in this movement. This may partly be due to the fact that other local bar associations now know that the matter is being given earnest attention and is on the active agenda of the appropriate committee of the American Bar Association.
>
> Mr. Franklin E. Parker, Jr., last year's Chairman of the Executive Committee of this Association, recently has been appointed as the member from this District of the Judiciary Committee of the American Bar Association. He has expressed approval of these proposals and it is most fortunate to have him as liaison between this Association and that Committee.
>
> Most cooperatively, Mr. Buchanan is deferring setting the date for the next meeting of this Committee, whose members, coming from each Federal District, have to assemble from all over the country, until there has been an opportunity for this Association to act upon the proposed resolution herewith being presented.
>
> It will give the rolling ball a vigorous push if these proposals are now endorsed by the membership of this Association.

The members of the reporting Committee in the New York City Association are Edwin A. Falk, Chairman, Chauncey Belknap, William C. Chanler, William Dean Embree, Caesar Nobiletti, George Roberts, Harrison Tweed, President, ex-officio, Paul B. DeWitt, Executive Secretary, ex-officio.

The subject matter of some of the present resolutions and preliminary action by the House of Delegates on them were reported in 32 A.B.A.J. 493, 823, August and December, 1946; 33 A.B.A.J. 190, February, 1947.

2

Plans Are Advanced for Continuing Education of the Bar

▪ An organization to provide opportunities for lawyers to continue their education in law and keep informed as to developments has been created by the American Law Institute and our Association. A Committee of twenty-two members representing the two organizations met in Chicago on November 7 and 8 to lay the groundwork. The program will be carried out by the American Law Institute, with the supervision of the new Committee on Continuing Legal Education. The arrangement was approved by the House of Delegates in Cleveland on September 25.

▪ The new project will place emphasis on the practical problems of lawyers and will be patterned to meet the desires and needs of the Bar in all types of communities from rural to metropolitan. The Institute will offer through the Committee its materials and services to local Bar Association committees on professional education and related groups. It will endeavor to ascertain from local groups what is desired and will then assist such organizations in sponsoring and carrying out courses in the desired field. There will be a full-time director and staff and financial backing until the plan becomes self-supporting. The Institute will supply monographs or similar publications, prepared by experts, as a background for the various courses, and will in addition make available to the local groups a panel of outstanding authorities in the fields of law covered. These may be supplemented, especially on subjects involving local peculiarities in the law, by recognized local experts. The Practising Law Institute will cooperate with the Committee.

At its Chicago sessions the new Committee elected Harrison Tweed, of New York, President of the American Law Institute, as Chairman of the Committee, and Judge Herbert F. Goodrich, Director of the Institute, as its Secretary. The twenty-two members of the Committee are the following: Thomas H. Adams, of Detroit; Herbert W. Clark, of San Francisco; Judge Charles E. Wyzanski, Jr., of Boston; Paul B. DeWitt, of New York; Arthur Dixon, of Chicago; J. B. Faegre, of Minneapolis; James D. Fellers, of Oklahoma City; Arthur A. Ballantine, of New York; Wendell B. Gibson, of Des Moines; Judge Herbert F. Goodrich, of Philadelphia; Tappan Gregory, of Chicago; William B. Gumbart, of New Haven; Judge Harvey M. Johnsen, of Omaha; Charles W. Joiner, of Ann Arbor; William L. Marbury, of Baltimore; Homer D. Crotty, of Los Angeles; Bernard G. Segal, of Philadelphia; Harold B. Seligson, of New York; Sidney Post Simpson, of New York; Robert G. Storey, of Dallas; William A. Sutherland, of Atlanta; and Harrison Tweed, of New York.

3

The Art of Advocacy:

Character and Skills for the Trial of Cases

by The Right Honorable Sir Norman Birkett, P. C.

■ We are privileged to bring to our readers a delightful and instructive exposition of the art of trying cases, by the gifted British jurist who has several times addressed our Association and is known to many of our members. For many years he ranked with the best among British advocates; then he ascended the King's Bench, was the British alternate judge at the Nuremberg trials, and was appointed this year a member of the Privy Council. All will attest the fullness of the experience from which he spoke.

Sir Norman's address was delivered on September 10, before the Lawyers' Club of Toronto, in Osgoode Hall. On an evening of sweltering heat, he spoke for more than an hour, wholly without notes; our report of his address is condensed from the stenotype transcript. He was introduced by D. L. McCarthy, K. C., of Toronto, a wartime President of the Canadian Bar Association, who has attended many meetings of our Association, including that in Cleveland in September. An unprecedented circumstance of his address was that, on his very popular motion in view of the heat and humidity, he and all his august auditors took off their coats. "Sir Norman in shirt-sleeves" may be conjured as far different from Sir Norman in full wig and robe, pictured herewith.

■ It is now ten years since I first came to Toronto as a member of the English Bar, and upon that occasion I brought the cordial greetings of my colleagues working at the English Bar. Now, by an accident arising out of and in the course of my employment, I come as one of His Majesty's Judges; but I feel no essential difference. And whilst I bring the cordial greetings tonight of the Bench and Bar of England, I bring them with no less fervor than I brought them ten years ago.

And that, sir, illustrates the most important factor in any community of lawyers—the fact that whether you come from the Bar or whether you come from the Bench you share the same cordial feelings. It may serve as an illustration of the greatness of the work which was done, first of all in our own country in the Twelfth Century, when for the very first time the lawyers became a self-conscious community; when, for the first time men who were not in Holy Orders were permitted to practice at the English Bar. And from that early date in the Twelfth Century the promotion has always been from Bar to Bench. And by that simple thing, dependent upon the reforms of Henry II, the great community of lawyers within the community was formed; those traditions which we so much value were formulated; and through all the centuries they have been in operation.

It is quite true that if you have been at the Bar you know what the Bar thinks about the bench. We in England treasure very much the freedom of the Bar, in the various messes on circuit and elsewhere, to speak their minds about the Bench; and so the tradition grows from day to day. Mr. Justice Field, one of our old justices of days past, was so deaf that when he sat in the Court he once mistook a clap of thunder for an interruption by the witness. And in Mr. Justice Field's day one barrister would say to another: "How are things in Field's Court?" And the answer invariably was: "Part heard".

The Ancient Story of the Deaf Plaintiff, Defendant and Judge

And speaking of the tradition that the Bar should have the license to speak freely among themselves about the judges, I was interested to observe, when looking into the Greek anthology the other night to find a particular quotation unconnected with the law, to find there the story which still circulates in England about the deaf judge, the deaf plaintiff and the deaf defendant. The judge took his seat upon the bench; the plaintiff and the defendant came before him; and the judge said: "You will begin".

The plaintiff had never heard a word, neither had the defendant, but he saw the judge's lips had stopped moving and said: "My Lord, my claim is a claim for rent".

Of course, the defendant never heard a word about this, and neither did the judge; but the plaintiff's lips had stopped moving, and the judge turned to the defendant and said: "What do you say to that?"

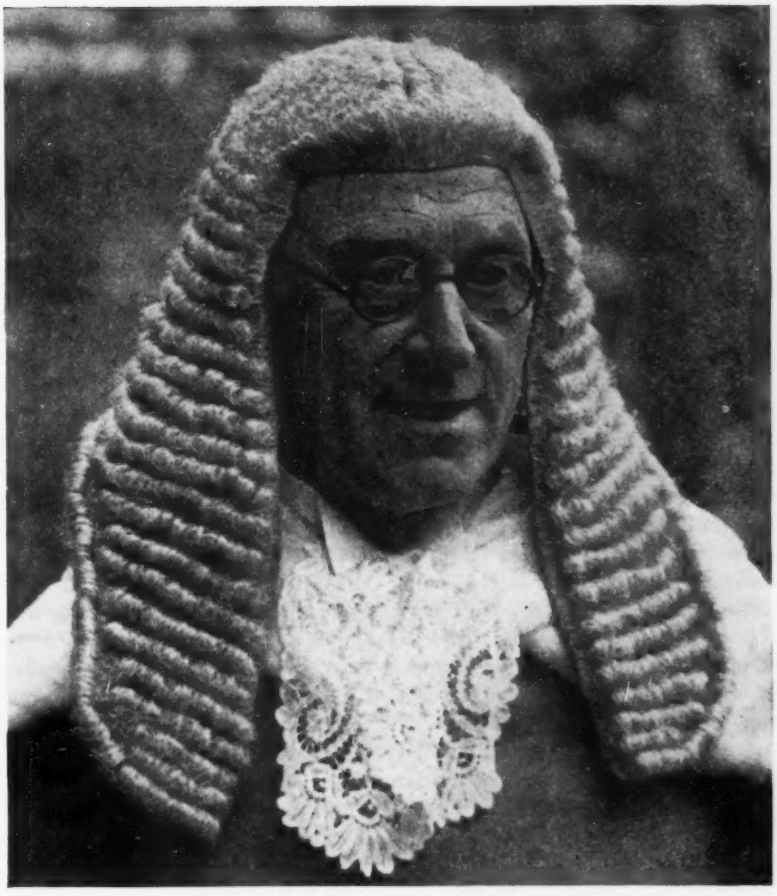
So the defendant, who had never heard a word, said: "My Lord, how can that be when I grind my corn at night?"

Of course, the plaintiff never heard a word about this and neither did the judge, but he saw his lips had stopped moving. The judge pulled himself together and said: "Well, I think this is a most difficult case but I see no useful purpose in reserving my judgment. As I have formed a clear opinion I propose to give expression to it. I have come to the conclusion that she is your mother and you will both maintain her." So the license to speak freely of judges is pretty ancient.

Then we had a perfectly delightful case of a very pleasant judge indeed who was trying a very complicated financial case. And he came finally to deliver his judgment and he said: "And so I come to the conclusion that I must find for the plaintiff, and I find for the plaintiff in the sum of 25,452 pounds, 16 shillings and 11 pence, but of course, if my figures aren't quite right, no doubt the counsel for the plaintiff and the counsel for the defendant will check me and correct me." Whereupon, the counsel for the plaintiff said to the counsel for the defendant in a loud whisper, "Why the damn old fool has added the date in". And the kindly judge, overhearing said: "So I have".

Our Profession Is Great Because It Is Devoted to Justice

Those are the kind of things which are only permissible and permitted when the community of interest between Bench and Bar is founded not upon the ephemeral things but founded upon something much more deep and much more lasting. And between the Bench and Bar in England, and I am sure between the Bench and Bar in Canada, there is that community of interest which is based upon one thing, namely, that our profession is devoted to the administration of the greatest thing in any civilized community—the administration of justice. And we in England pay great attention to tradition and to ceremonial. When the judge is going upon circuit, let us say to York to attend service in the Minster, he goes arrayed in full scarlet and ermine, and the stately procession through the ancient city of York brings all the populace to the street sides and they see the visible embodiment before them of the King's justice being brought to every part of the community. And though it is not for me to make suggestions with regard to procedure here or anywhere else, I can only say that the habiliments, the trappings, the ceremonial which is attendant upon the procession of the judges through the cities of our land, the pomp with which justice is administered, does certainly give not merely dignity to the Bench, but gives to the populace throughout our land a deep-seated admiration, which almost on occasion approaches reverence, for the value which the King's justice represents.



THE RIGHT HONORABLE SIR NORMAN BIRKETT

In these days of change, when the cherished institutions are in some danger from revolutionary hands, it is vital that that upon which everything else depends, the respect for law, for its administration, should be preserved; and the ceremonial and the tradition extending down through the ages, in my judgment, tends greatly to that end.

The links between Canada and Great Britain, and the links between the lawyers, are deep and lasting.

We are members of a great profession, with a great history and a great responsibility. Every civilized community must—it is imperative—have within its borders a body of men trained in the law whose purpose is not merely to make money, not merely to seek and to win honor—though these things are not to be despised—but their purpose, the purpose of the community of lawyers within the community, is that the ordinary citizens shall always have at their disposal the man who can protect them, who can defend them, who can stand up before arbitrary power from whatever quarter it may come and assert the inalienable rights of the individual to the eternal freedoms. That is the center of all lawyer's work and the lawyer's ambition. And indeed, if you reflect upon it—I don't know how it is in Canada but in Great Britain where there is this deeply-rooted respect for the law, the lawyer himself is never likely to be a greatly beloved figure, and the real reason is because of one of the greatest virtues of our system.

The Advocate Cannot Be Judge of His Client's Cause

We in England have an unwritten law—the unwritten law is frequently much more powerful than the written—that every counsel, whoever he may be, has no right to decline any brief that may be offered to him except for good and sufficient reason. In my own practice at the English Bar, I have frequently had to undertake murder cases of the greatest complexity and difficulty, not because I wanted to but because of the unwritten law that I could not refuse them. It was Lord Erskine, perhaps the greatest advocate who ever trod Westminster Hall, the great Erskine, when he undertook the defense of Tom Paine—and you may read it in the State Trials—was the subject of the fiercest criticism by political parties in England because he undertook that defense. And on that memorable occasion in Westminster Hall, Erskine laid down the first rule with regard to the English advocate. "When the day comes", said Erskine in the course of that magnificent defence, "that the advocate in England is permitted to choose whom he will and whom he will not defend, and becomes not the advocate but the judge in the cause, at that moment the liberties of the citizens of England are at an end".

And that quality, the result of the unwritten law that the advocate trained in the law to defend the citizen shall be available to the citizen, is one reason why the lawyer in England is unpopular. Why, it is said, does the lawyer affect views in which he does not believe? He puts forward to the Court submissions which he may or may not think sound, but that is the rôle of the advocate. What the public will never understand is that the man who stands there to plead is not pleading his own view. He may be putting forward a view of which he profoundly disapproves; but he is putting forward, for the client, the view of the client.

We had a famous case in England of an advocate appearing for a prisoner, who in the midst of an impassioned speech to the Court stopped and said: "Now, Milord, I will lay aside the rôle of the advocate and I will assume the rôle of the man". And Milord upon the bench said: "You have no right to do any such thing. The only title by which you may be heard in this Court is that you speak as an advocate."

And the great Lord Brougham in his famous defense of Queen Caroline carried the doctrine to an extreme length when he asserted before the Court that the duty of a counsel to his client was so deep and so strong that it in fact over-rode his duty to his country. That is a proposition to which, I am quite sure, you of the Bar would not agree; but it is an illustration of the length to which the doctrine of the advocate speaking for the client may go.

And when you find great prose writers like Swift saying of advocates that they are men bred in the art of proving "that white is black and black is white, according as they are paid", it is because of the great virtue of the advocate that he is there to present the view of the client. And it leads me to say this further thing: Because of that duty, because of that responsibility, there are certain qualities of the advocate about which I hope you will allow me to say a word or two tonight.

Just let me say before I do it, that I don't pretend for one moment to give anybody advice about advocacy. I expect there are plenty of people who now hear me speak who are quite as competent to talk about the elements of advocacy as I am, but it is a subject on which we are all interested and therefore, perhaps, with humility and with deference, you will allow me to make a few observations about it.

There Is No One Pattern for Greatness as an Advocate

I have now been at the Bar and upon the bench for thirty-four years and I have seen almost every type of advocate in almost every type of Court. And I know at once there are no standards that you can lay down and say, if you want to be a great advocate, there is the pattern. It can't be done. There are diversities of gifts but the same spirit; and I have known in my time, men who could scarcely string a sentence together, who lacked all graces, and yet impressed the Court so that the Court strained to listen and to catch every word that was said. And I have known the impassioned orator who swept juries off their feet.

I was in the chambers of Marshall Hall and I shall never forget that very great man. There were times when Marshall Hall had very great failures, and there were times when he had the most resounding triumphs. To see Marshall Hall come into the Court surrounded by a retinue of people carrying pencils and air cushions and all sorts of things was an art in itself. Marshall Hall would sit there and he was not above certain, shall I call them, small tricks. This air cushion which he had—if the cross-examination of his client was getting pretty severe he would

put the air cushion under his arm and go fsh! fsh! fsh! So that the cross-examining counsel was very greatly disconcerted. But I have heard Marshall Hall on some of the big cases, the defense of Fahmy at the Old Bailey, the defense of Greenwood, when Marshall Hall quoted to the jury that wonderful thing from Othello: "Put out the light, put out the light". To hear Marshall Hall on the full tide of his forensic oratory was a thing never to be forgotten.

These were great figures in my very early days. Edward Carson, the finest cross-examiner within my recollection at the English Bar, had a very attractive Irish brogue. You all know famous stories of Carson; you read them in the press: "Do you drink?" And the witness says: "That is my business". And Edward Carson says: "Have you any other?" But to hear it in the brogue, the effect was indescribable.

Rufus Isaacs was a great cross-examiner with an extraordinarily simple method of opening in his cross-examination. In the Seddon case, as you know, Seddon was charged with the murder of an old lady named Miss Barrow. On the opening of it in that crowded court –Seddon, the little, composed, ready, versatile prisoner; Rufus Isaacs at his very best, and he begins: "Seddon, did you like Miss Barrow?" And Seddon, surprised by the opening question, said: "Did I like her?" Said Rufus Isaacs: "That was the question". And in that simple, incisive, forcible, direct way one of the most wonderful cross-examinations in the world was begun.

Lord Hewart had an inimitable way with him. I remember a Greek witness called Pappinuckulous, a very undesirable man with a very bad character, and he was going to give evidence—at least, it was said that he was going to give evidence. And he used to come in at one door of the Court and probably leave by the other one. Upon one occasion he tried to push his way in to the front row of counsel which, as you know, in England is absolutely sacrosanct, and the usher put him out. All that went on under the observant eyes of Hewart. And at the supreme moment he came to the jury and said: "Members of the jury, then there was the witness, the Greek Pappinuckulous, sometimes coming through that door, sometimes going out through this other door; occasionally trying to push his way into the ranks of counsel, here, there and everywhere." And then, pointing to the witness box: "*but never there, never there*". The effect upon the jury was profound beyond all words.

Simple Speech Makes the Most Powerful Appeal in Court

And I once heard one of the most moving things I have ever heard in a murder trial by the advocate for the defense, words that I knew by heart, and yet the effect upon the jury was quite startling.

> The moving finger writes; and, having writ,
> Moves on: Nor all thy Piety nor Wit
> Shall lure it back to cancel half a line,
> Nor all thy Tears wash out a Word of it.

And that leads me to say that while there are no fixed standards for forensic oratory, and there are no patterns and no types to which the advocate must conform, yet I have found that it is simple speech that makes the most powerful appeal. Now when you think of it, you take the Gettysburg address. It is perhaps the greatest speech that ever fell from the lips of man. "Fourscore and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal." Nothing could exceed it for simplicity. Take the Authorized Version of the Bible and pick where you will. Take the great stories of the Bible, such as the story of the Prodigal Son, and note this essential simplicity. It is the simple, direct, incisive speech that wins the great victories. And so it is in the Court. My experience has always been with regard to the great advocates that I have known that it was the element of direct, forceful, lucid, vivid speech, in all its simplicity that gave them their strength.

Most Cases Are Won by Preparatory Work

My own private view is that most cases are won before you go into Court. It is the preliminary, the preparatory work, the mastering of the brief so that every fact and every figure is in your head, that is all-important. I always found it most useful to have the essential things on a little sheet of my own, so that they could be referred to instantly at any critical moments in the case. The conference, as we call it in England, when you have your discussion with the experts, is of the utmost importance. For example, in the great murder trials it was often necessary to understand the effects of arsenic on the human body and to discover matters which were simply of vital importance as the case proceeded. One of the cases that I had to defend, a case which came from the West Country, was where a woman was charged with the administering of arsenic to various people. It was necessary that we should understand from the point of view of the defense, in every detail, the effect of the administration of arsenic upon the human body. And as you probably know, arsenic taken into the body has certain well-known pathological effects, but one thing is of the greatest importance, it comes down through the strands of the hair from the inside, from the inside. And your expert, by taking the strand of hair, can tell you when the arsenic was first administered and in what probable strength.

In this particular case it so happened that the body of one of the victims was exhumed in the Lewannick Churchyard and they decided to conduct the post-mortem in the churchyard. And by the strangest circumstances, the soil of that Cornish churchyard at Lewannick was charged and impregnated with arsenic, and it was the easiest thing therefore for the cross-examiner to say to the pathological expert from the Home Office, and to tell

(Continued on page 80)

4

Administrative Procedure Act:

A Warning Against Its Impairment by Legislation

by John W. Gwynne • Member of Congress from Iowa

■ One of the most timely and significant addresses in Cleveland was that by Congressman John W. Gwynne, of Iowa, ranking majority member of the Committee on the Judiciary in the House of Representatives, long a stalwart advocate and draftsman of legislation to curb abuses of power by administrative agencies and to subject them to rules of law, justice and fair play. Speaking on "National Legislation and Administrative Law" before the Section devoted to that subject, he called attention to the responsibility of the Bar as well as the Congress for vigilance in seeing to it that the Administrative Procedure Act is not whittled away and impaired by administration, interpretation, or future legislation. As to this danger he gave a pointed warning. Constructively he outlined several "propositions" or practices which he thinks should be followed in the drafting of future legislation affecting the agencies and the Act, and also made a statement regarding our Association's proposed Administrative Practitioners' Act (H.R. 2657), which he has introduced and sponsored. (For the text of the bill, etc., see 33 A.B.A.J. 307; April, 1947). His address is published in full.

■Senator Pat McCarran, while Chairman of the Senate Committee on the Judiciary, made the following statement:

> The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. It embarks upon a new field of legislation of broad application in the "administrative" area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other. Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men.[1]

The adoption of this Act crowned with success the efforts of many persons over a period of years. The American Bar Association is particularly entitled to great credit for the final result. The members of your committees who worked so long and so faithfully deserve the gratitude of the American people.

Bar Has Continuing Responsibilities As to the Act It Sponsored

I desire at this time to present a few observations concerning our future relations to this law. In that field, the Congress and the Bar of the Nation have important responsibilities.

Many of us have long been concerned about the tremendous centralization of power in the federal Government. There has been a great rise in the number and in the power of agencies exercising legislative and judicial authority. Serious inroads have been made in the rights of States and local communities. Private enterprise and individual responsibility have suffered from increasing, and often unwarranted, governmental interference.

In my opinion, the time has come for a reversal of this trend. Constitutionally created legislative and judicial bodies must be restored to their rightful place. The attempt to regulate government agencies must not divert us from the duty of eliminating those not needed and restoring their functions to the source from whence they came.

The Administrative Procedure Act was, of course, not designed to attain that objective. It should, however, be a wholesome influence in checking unnecessary growth and in preventing further usurpation of power. Bureaucracy will not flourish so dangerously when kept in check by a

1. From the Foreword by Senator McCarran to a brochure prepared and presented by the American Bar Association on October 30, 1946, to members of the Committees on the Judiciary in the Senate and House of Representatives, entitled *The Administrative Procedure Act* and setting forth the legislative history of the Act, the hearing held on it, the evidences of legislative intent, etc. The contents were later presented by Senator McCarran for printing as a public document.

vigilant Congress and when required to operate in accordance with established principles of justice and fair play.

Nevertheless, it must be recognized that many of these agencies cannot be eliminated. They came into existence to render services that purely legislative and judicial bodies could not render. The development of commerce in England created problems that the common law Courts of the day seemed unable to handle. And so there grew up the law merchant—administered in separate informal tribunals. Equity law had a somewhat similar history. It is to the credit of the judges and lawyers of that day that they were able to recognize the need of these new principles of jurisprudence, and to eventually bring them within the orbit of the common law as then being administered. Thus the needs of a progressing civilization were met; the law was enriched; and the fundamental principles of due process were retained and developed.

In similar fashion, the economic development of America, the complexity of our relationships, have brought us constantly new and difficult problems. The increasing importance of transportation indicated a need for the Interstate Commerce Commission. Concentration of economic power resulted in the Federal Trade Commission. Difficulties between management and labor introduced the National Labor Relations Board. A rising tide of social consciousness created the Social Security Board. And so the expansion of "administrative government" and the growth of "administrative law" has been a major phenomenon of our time.

Just how much this expansion and growth will inure to the eventual welfare of our people has often been debated. The size of our federal establishment in the future will be a matter for Congress and the people to decide. But whether there be many agencies or relatively few, we must see to it that all operate according to the pattern laid down in the Administrative Procedure Act. That, I believe, is the first responsibility of the Bar of the country.

Secondly: You and I must be ever vigilant in seeing that the Act is administered in accordance with its true intent and spirit. In certain quarters, this law was not greeted with shouts of welcome. Some agencies admitted that the proposed legislation was good "for the other fellow".

The Act lays down requirements as to the issuance, publication and availability of information concerning administrative organization, procedure and policies. It establishes methods for rule-making and gives the citizen some right of participation therein. It provides for hearings and adjudication under conditions favorable to fair and impartial treatment. It contains comprehensive provisions for judicial review. It requires nothing of the agency that it cannot give; it guarantees to the citizen nothing to which he is not entitled. Those who administer the law must keep that constantly in mind. In fact, much of the success of the Law will depend upon its enforcement. So, adequate and competent personnel should be made available to carry out the purposes of the Act.

The Act Should Not Be Whittled Down or Impaired

Third: Care must be taken that subsequent legislation shall not repeal

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or whittle down the provisions of the Act. During the last session, one bill expressly exempting a certain agency from the Act was rejected by the House Committee on the Judiciary. A number of other bills are pending which purport to operate in the field covered by the existing law. These bills fall into the following categories:

(1) Those which expressly amend the Act by sections, etc.;
(2) Those which do not specifically amend the Act but modify the procedures for a single agency and refer to the Act; and
(3) Those which do not specifically refer to the Act but which provide for methods of procedure, etc., and appear to be modifications thereof.

All of these bills should be carefully scrutinized before they are allowed to become law.

Suggestions as to the Drafting of Future Legislation

The fourth suggestion is directed particularly to members of Congress

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Concerning the Author: John Williams Gwynne was born in Victor, Iowa, on October 20, 1889, and was graduated from the State University of Iowa with the A. B. and LL. B. degrees in 1912 and 1914, respectively. In the latter year he was admitted to the Iowa Bar and began the practice of law in Waterloo, which is still his home. In World War I he was a second lieutenant in the 88th Division. From 1920 to 1927 he was the county attorney of Blackhawk County. Elected first to the 74th Congress from the Third Iowa district in 1935, he has been re-elected and has served continuously since that time. As a member of the House Committee on the Judiciary, he has taken an especial interest in constructive legislation as to administrative law and procedure. A previous article by him in the Journal was "The Architecture of the New Administrative Procedure Act" (32 A.B.A.J. 550; September, 1946). He is a Republican and an Episcopalian.

and to others interested in drafting legislation. The Administrative Procedure Act necessarily modified certain laws existing on the date it became effective. But it does more than that. Its provisions are applicable, not only to then existing agencies, but to those which may be created in the future. If that is kept in mind, much work will be saved and better results secured.

For example: In future legislation there is no general necessity for express reference to the Act. As pointed out, it automatically applies to agency operations within its terms. There will, however, be occasions when references may be made in order to make applicable provisions which, under the Act itself, would not be operative. Section 2 contains the necessary general definitions. So long as judicial interpretation applies them according to their intent, there should be little occasion for either amendment or reference to them in the future. In any event, it will be helpful if the same terminology is maintained. Section 3 (a) sets out what rules shall be made or published and the consequence for failure to do so. In future drafting, it should not be necessary to refer to this section unless it is desired that something be published in the *Federal Register* not included in Subsection 3 (a). Many other illustrations could be given.

Propositions as to the Forms of Future Legislation

To state the matter briefly, those responsible for drafting future legislation should keep in mind the following general propositions:

(1) Since the Act is generally applicable to agencies and actions within its terms, there is no necessity to make general or specific references to it except for special purposes. If that course is followed, it will greatly simplify legislative drafting because it will no longer be necessary to retrace the ground, if the application of the general provisions of the Act are deemed adequate in a given situation.

(2) Care should be taken not to write provisions which duplicate, conflict with, or appear to minimize existing provisions of the Act which would otherwise and in any event be applicable to the subject matter.

Regulation of Practice Before Administrative Agencies (H.R. 2657)

Although the Administrative Procedure Act regulates procedure in Government agencies, it does not undertake to determine who shall practice there. This omission was not, however, due to any feeling that such regulation was not needed. Every State prescribes who may practice before its tribunals. On the other hand, Congress, with few exceptions, has left the practice before agencies largely to the control of the agency itself.

The American Bar Association through its committees has made an extensive study of this subject and made certain recommendations. A bill embodying these suggestions, H. R. 2657, was introduced in the present Congress and is pending before the House Committee on the Judiciary. The subject is also being considered by the Senate Judiciary Committee. Hearings have been held on H. R. 2657 and will be resumed when Congress reconvenes. It is our intention to afford ample opportunity for all interested parties to appear and explain their views concerning this important matter. The enactment of a proper law on the general subject of practicing before federal agencies will make much easier the administration of the law already passed concerning the procedure itself.

It is very gratifying to note the continuing interest of the Bar in administrative procedure and practice. It is an answer to the charge of the demagogue that our Constitution is out of date—that our form of government is not equal to the problems confronting it. It is notice to discouraged people everywhere that in America we have confidence in those eternal principles of liberty and justice, for which we have fought, and which have ever been enshrined in our hearts.

"I Have Never Appointed a Member of My Own Party" to the Bench

■ The leading editorial in our November, 1947, issue (page 1118), based on the statement of the Lord Chancellor of Great Britain at our Association's Annual Dinner in Cleveland ("'I Have Never Appointed a Member of My Own Party' to the Bench"), attracted attention in Washington as elsewhere. On the legislative day of November 24, the editorial was ordered to be published in full in the *Congressional Record* on the request of Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary who said, in part, concerning it (*Congressional Record*, December 1, 1947; page A4770):

> Mr. President, it has been my effort throughout my work on the Senate Judiciary Committee to bring about the finest possible non-partisan selection of judges to the Federal bench, the selection of men unalterably devoted to our constitutional system of checks and balances. . . .
>
> In this connection, the November issue of the AMERICAN BAR ASSOCIATION JOURNAL contains a very stimulating editorial with regard to the British experience in non-partisan selection of judges. My colleagues are familiar with the outstanding caliber of the editorials in the Bar Journal. . . Because this editorial is worthy of our deepest consideration for the light that it may contribute on this subject, I ask unanimous consent that its text be printed in the Appendix of the RECORD.

5

State Courts:

New Jersey Reorganizes Its Judicial System

by **Nicholas Conover English** • of the New Jersey Bar (Newark)

■ Lawyers in many States will be interested in New Jersey's revision of its century-old structure of Courts, accomplished by the popular adoption of a new State Constitution containing a comprehensive re-vamping of the basic pattern of the State's judiciary, which had resisted change for 103 years. More significant and impressive than the particular changes is the demonstration that nowadays the lawyers of a State can interest the people in improving their judicial system and that thorough-going reforms can be debated before the electorate and carried to decisive victory at the polls.

The structure of New Jersey's Courts had ancient and most honorable origins. The State had treated itself sparingly to new Constitutions and had abstained from changing its Judicial Article. Its first Constitution was adopted in 1776, immediately following the declared independence of the American colonies. It largely retained the system of Courts developed during colonial days. It was superseded by the Constitution of 1884, which made few changes as to the Courts and has remained in effect ever since. Many lawyers of the State have believed in and cherished its pattern of Courts, and have defended it valiantly; but the organized Bar as a whole, particularly its younger members, were able to convince the people of the needs for modernization and simplification of both structure and rules.

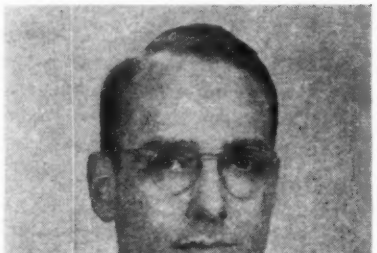
Probably in no other State had so complex a structure of Courts survived so long. Consequently, the details of the changes made in New Jersey are hardly a precedent or pattern as to what may be needed elsewhere. The structures of the judicial systems of most of the States seem fairly well suited to the needs, and the administration of justice, at least in the appellate Courts and those of general trial jurisdiction, seems reasonably satisfactory in nearly all instances. The problems are of methods of judicial selection which will eliminate partisanship and ensure impartiality and fitness, of ways and means of bringing about adequate salaries and greater security of tenure, of revisions of rules and procedures and costs so as to make equal justice under law fully available to the average citizen.

The emphatic vote of the people of New Jersey on November 4, as well as that in New York on the same date (see our December issue, page 1169), does demonstrate, to the lawyers and citizens of every other State, that even the most drastic changes in the State judiciary, its structure, selection, and tenure, can be explained and "sold" to the voters through the leadership of an aroused and public-minded Bar. Whatever changes are needed to improve further the administration of justice and the methods of selecting judges in your State can be accomplished, if a united and militant Bar "goes to town" for remedial proposals. Such projects are under way in many States in 1948.

■ The new Constitution of New Jersey was drafted and promulgated by a convention of delegates elected by the people. The convention met at Rutgers University, in New Brunswick. The Judicial Article was drafted by a special committee made up of six lawyers and five laymen. Revision of the Judicial Article was a primary objective of the convention.[1] Bar Associations and individual lawyers took the leading part in proposing and discussing changes.[2] The 1947 convention accordingly met at a time when the Bar and the public had been giving an increasing amount of attention to problems of the administration of justice in the State.[3]

The significance of the provisions of the new Judicial Article can be understood only by some comparison of them with those of the Constitution of 1844. The latter provided:[4]

> The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes, as heretofore; a Court for the Trial of Impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts, and such inferior Courts as



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now exist, and may be hereafter ordained and established by law; which inferior Courts the Legislature may alter or abolish as the public good shall require.

Simplicity has been achieved in the new Constitution, which provides[5]

The judicial power shall be vested in a Supreme Court; a Superior Court; County Courts, and inferior Courts of limited jurisdiction. The inferior Courts and their jurisdiction may from time to time be established, altered or abolished by law.

The Court of Errors and Appeals, unique among American Courts, consisted of the Chancellor (who, under the Constitution, was the Court of Chancery), the Justices of the Supreme Court, and six judges specially appointed.[6] These six, commonly *called* "lay judges", have sometimes been lawyers of distinction and ability; but in many instances they have in fact been laymen. In 1844 considerable public opinion was insistent on the retention of some laymen in the Court of last resort.[7] In 1844, the Supreme Court consisted of but five justices. Since the Chancellor or the justice who had sat below would be disqualified from sitting on the appeal, the practical result was that ordinarily the "lay judges" constituted a majority of the Court. The subsequent increase in the number of Supreme Court justices to nine has had the result that for more than seventy years the Court of Errors and Appeals had had sixteen members, all of whom had other official duties.

Simplification of the Structure and Powers of Historic Courts

For nearly a century the Bar has urged, from time to time, the creation of an independent Court of last resort. The new tribunal is the Supreme Court, consisting of a Chief Justice and six Associate Justices.[8]

The Superior Court under the new structure may be roughly said to represent the merger of the Court of Chancery, the old Supreme Court, and the Prerogative Court. New Jersey was one of the few States which retained into recent times a separate Court of Chancery. In New Jersey that Court really dated from 1704, when it was created by an ordinance of the first Royal Colonial Governor, Lord Cornbury, in the image of the English High Court of Chancery.[9] It has retained down to the present all of the traditional powers of its English prototype.[10] To permit the growing volume of business to be handled, the Legislature, beginning in 1871, authorized the creation of Vice Chancellors and Advisory Masters, who for practical purposes have been the actual judges of the Court of Chancery, but their authority has been limited theoretically to advising the Chancellor what orders or decrees should be made by him.[11]

In its old Supreme Court, also established by an ordinance of Lord Cornbury in 1704, New Jersey has had what was essentially the old Court of King's Bench,[12] sitting *en*

1. The ink had hardly dried on the Constitution of 1844 before leading lawyers began advocating changes in its Judicial Article. As far back as 1887, the *New Jersey Law Journal* "wearily exhorted the Bar back to the fray, to rally behind a new amendment to the Judicial Article," saying: "The meeting of the Legislature affords another opportunity to attempt a reorganization of our judicial system. So many abortive attempts have been made that the mere suggestion provokes a smile, but at the risk of this we . . . urge that another attempt be made." Amendments were proposed from time to time, but failed of adoption. The last attempt, before 1947, was the submission by the Legislature to the people, of a new Constitution, including reorganization of the judiciary (for text see 67 N.J.L.J. 85), but this failed, by a narrow margin, to be approved by the people.

2. The movement for a Constitutional convention originated, or gained its principal impetus, in 1939, in the Junior Section of the State Bar Association (62 N.J.L.J. 201; 63 N.J.L.J. 21, 24, 25; 64 N.J.L.J. 21). The movement made marked headway when Governor Charles Edison backed judiciary reform vigorously. Proposals for revising the Court system were made (64 N.J.L.J. 565, 577) and debated by members of the profession (65 N.J.L.J. 4, 429, 445, 457). These efforts resulted at the time in the proposals defeated in the popular vote of 1944.

3. Many suggestions for improving the Judicial Article were submitted to the convention by public and civic groups, including the Bar Associations. See: N. J. State Bar Association recommendations, 70 N.J.L.J. 189; Mercer County Bar Association recommendations, 70 N.J.L.J. 225; Essex County Bar Association recommendations, supplement to June 5, 1947, issue of 70 N.J.L.J.; series of editorials, 70 N.J.L.J. 125, 133, 141, 149, 157, 165, 189, 228, 244, 260. The Judicial Committee at the convention also had the benefit of testimony and advice from many distinguished jurists, including Judge Learned Hand and Dean Roscoe Pound (70 N.J.L.J. 241, 249).

4. Const. 1844, Art. VI, Sec. I, Par. 1.

5. Const. 1947, Art. VI, Sec. I, Par. 1.

6. Const. 1844, Art. VI, Sec. II, Par. 1.

7. Keasbey, *Courts and Lawyers of New Jersey*, page 407 *et seq.*, 421.

8. Const. 1947, Art. VI, Sec. II, Par. 1.

9. *In re Vice Chancellors*, 105 N. J. Eq. 759, 148 Atl. 570.

10. *Eggers v. Anderson*, 63 N. J. Eq. 264; 49 Atl. 578.

11. *In re Vice Chancellors, supra.*

12. *State, Dufford v. Decue*, 31 N. J. L. 302.

Concerning the Author: Nicholas Conover English was born in Elizabeth, New Jersey, in 1912. He was graduated from the Pingry School, Princeton University (A.B., *magna cum laude*, 1934), Harvard Law School (1937), and has been admitted to practice in New Jersey as an attorney at law and as a counsellor at law. In World War II he served for three years in the Navy, in California and the Southwest Pacific, and was discharged as a lieutenant, U.S.N.R.

He has been associated with the Newark firm of McCarter, English and Studer since 1937, and was made a member of the firm January 1, 1947. George McCarter, another partner, was a member of the House of Delegates from 1942 to 1946.

English became a member of our Association in 1939, and is a member also of the Essex County Bar Association. In 1946-47 he was New Jersey State Chairman of the Junior Bar Conference. Presently, as reported in "Our Younger Lawyers" in this issue, he is the chairman of the Conference's Committee to Aid the Small Litigant. In New Jersey he was active in the support which the younger lawyers gave to projects of judiciary reform and the new State Constitution.

banc at Trenton (instead of Westminster) and also at *nisi prius* in the several counties, and having general common law jurisdiction. This Court issued prerogative writs and heard appeals from the inferior Courts and from administrative agencies. In recent years, cases in the Supreme Court at circuit have been tried by Circuit Court judges.

The Prerogative Court of New Jersey goes back to the authority given Lord Cornbury to exercise the ecclesiastical jurisdiction over matters of probate and administration.[13] Under the Constitution of 1844[14] the Prerogative Court retained both original jurisdiction in probate matters and also was given jurisdiction to hear appeals from the Orphans' Court, created by statute in 1784 to exercise original jurisdiction in matters of probate and administration.[15] Each of these Courts, its history, jurisdiction, and membership, was much more complicated than I have here stated by way of main outline.

Under the new Constitution, probate jurisdiction is given to the County Court as the successor of the Orphans' Court.[16] The conferring upon the Superior Court of "original general jurisdiction throughout the State in all causes"[17] would seem to include the concurrent original jurisdiction of the Prerogative Court in matters of probate and administration.[18] The appellate jurisdiction of the Prerogative Court will be now exercised by the Appellate Division of the Superior Court.[19]

Primarily from these sources, the new Superior Court has been formed. It has original general jurisdiction throughout the State,[20] and is to be divided into an Appellate Division, a Law Division and a Chancery Division.[21]

The authority to issue prerogative writs, formerly exercised by the old Supreme Court, has been given to the Superior Court, but a significant reform has been accomplished in the process: "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary."[22]

The exact lines of demarcation between *quo warranto, mandamus,* and *certiorari* have long been a mystery to the Bar of New Jersey, and seemingly, at times, to the bench;[23] and for the past year or more the State Bar Association has been actively pressing for a simplification of the practice respecting these writs.[24] The new Constitution paves the way for this reform.

Distribution and Simplification of Appellate Jurisdiction and Procedure

With respect to the distribution of appellate jurisdiction between the Supreme Court and the Appellate Division of the Superior Court, it was the purpose of the framers of the Judicial Article to establish a system similar to that which obtains in the federal Courts, but at the same time to leave the matter sufficiently flexible so that changing conditions could be dealt with within the constitutional framework. Accordingly, the Appellate Division is given jurisdiction to hear appeals "from the Law and Chancery Divisions of the Superior Court, and County Courts and in such other causes as may be provided by law".[25] Only a few specified cases of an important nature can be taken to the Supreme Court as of right, although the Legislature has authority to permit any cause to be taken to the Supreme Court.[26] The provision that "The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution,"[27] is considered limited by virtue of its last four words to the subsequent provision enumerating the four specific classes of appeals which may be taken to the Supreme Court.[28] It remains to be seen whether the Legislature will permit appeals from final judgments in the Superior Court to be taken directly to the Supreme Court, just as direct appeals to the Court of Errors and Appeals have heretofore been taken from the Chancery, Prerogative, Supreme and Circuit Courts, or whether the Legislature will channel all appeals in ordinary cases to the Appellate Division, so as to reserve the Supreme Court for careful consideration of comparatively important cases.

Under the Constitution of 1844 and legislation, there have been a number of Courts of county-wide jurisdiction: The Circuit Court and Court of Common Pleas were both of general common law civil jurisdiction; the Orphans' Court was a probate Court; and Court of Oyer and Terminer, Court of Quarter Sessions, and Court of Special Sessions, were all criminal Courts. The Common Pleas Judges held all of these except the Circuit Court. Under the Constitution of 1947, the Circuit Courts have been abolished and the other Courts have been merged into a new County Court.[29]

As proposed to the convention by the judiciary committee, the County Court was to have jurisdiction only in criminal and probate matters. However, amendments from the floor of the convention were adopted at the insistence of the rural counties, so that the County Courts have also been given general civil jurisdiction.

Unaffected by the new Constitu-

13. *In re Coursen's Will*, 4 N. J. Eq. 408.
14. Const. 1844, Art. VI, Sec. I, Par. 1; Sec. IV, Pars. 2 and 3.
15. *Harris v. Vanderveer's Ex'r*, 21 N. J. Eq. 424.
16. Const. 1947, Art. VI, Sec. IV, Par. 1.
17. Const. 1947, Art. VI, Sec. III, Par. 2.
18. Cf. *Harris v. Vanderveer's Ex'r, supra.* See also: Const. 1947, Art. XI, Sec. IV, Par. 8(d).
19. Const. 1947, Art. VI, Sec. V, Par. 2; Art. XI, Sec. IV, Par. 8(b).
20. Const. 1947, Art. VI, Sec. III, Par. 2.
21. Const. 1947, Art. VI, Sec. III, Par. 3.
22. Const. 1947, Art. VI, Sec. V, Par. 4.
23. See cases cited in "Proposed Revision of Rules of the Supreme Court Relating to the Prerogative Writs", 69 N.J.L.J. 409.
24. Idem.
25. Const. 1947, Art. VI, Sec. V, Par. 2.
26. Const. 1947, Art. VI, Sec. V, Par. 2: "Appeals may be taken to the Supreme Court:
(a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
(b) In causes where there is a dissent in the Appellate Division of the Superior Court;
(c) In capital causes;
(d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the County Courts and the inferior courts; and
(e) In such causes as may be provided by law."
27. Const. 1947, Art. VI, Sec. II, Par. 2.
28. See note 26.
29. Const. 1947, Art. XI, Sec. IV, Pars. 1 and 3.

5 New Jersey State Courts

tion are the civil and criminal District Courts created by the Legislature and having very limited jurisdiction, the Juvenile Courts, and also Police Courts in the various municipalities. One marked advance with respect to the minor Courts has been made in that Justices of the Peace are no longer constitutional officers whose powers are beyond the reach of the Legislature.[30]

Chief Justice the Administrative Head of the State's Courts

Another notable advance made in the new Constitution relates to the administration of the Courts. The Chancellor has always been the administrative head of the Court of Chancery, and has made the rules of practice and procedure in the Court. The Chief Justice of the Supreme Court has had limited powers of assignment over the judges of the Circuit and Common Pleas Courts.[31] Practice and procedure in actions at law has, since a statute enacted in 1912, been governed by rules of the Supreme Court.

Under the new Constitution, the Supreme Court (now the Court of last resort) "shall make rules governing the administration of all Courts in the State, and, subject to law, the practice and procedure in all such Courts".[32] The Clerk of the Supreme Court and the Clerk of the Superior Court are both appointed by the Supreme Court.[33] The Chief Justice of the Supreme Court is made the administrative head of all of the Courts in the State, and is to appoint an Administrative Director to serve at his pleasure.[34] In addition he is given authority to assign judges of the Superior Court to the divisions and parts thereof,[35] and to assign the County Court judges in certain instances.[36]

Furthermore, the new Supreme Court is expressly given "jurisdiction over the admission to the practice of law and the discipline of persons admitted."[37] Heretofore, attorneys and counsellors at law[38] and solicitors and masters in chancery[39] have been licensed by the Governor upon the recommendation of the Supreme Court. The Court's exclusive power

(Continued on page 83)

30. As under Const. 1844, Art. VI, Sec. VII, Par. 1. See: *Tomai v. Savastano*, 112 N.J.L. 362; 170 Atl. 615.
31. R. S. 2:5-5; R. S. 2:5-10; R. S. 2:6-10.
32. Const. 1947, Art. VI, Sec. II, Par. 3; and see Art. XI, Sec. IV, Par. 5.
33. Const. 1947, Art. VI, Sec. VII, Par. 3.
34. Const. 1947, Art. VI, Sec. VII, Par. 1.
35. Const. 1947, Art. VI, Sec. VII, Par. 2.
36. Const. 1947, Art. XI, Sec. IV, Par. 5.
37. Const. 1947, Art. VI, Sec. II, Par. 3.
38. *In re Branch*, 70 N.J.L. 537; 57 Atl. 431.
39. *In re Raisch*, 83 N. J. Eq. 82; 90 Atl. 12.

6 Nominations for Committee on Scope and Correlation of Work Are Under Way

■ A new step under the open and representative electoral procedures provided for in the Constitution and By-Laws of our Association has been inaugurated and will be completed when the House of Delegates meets in Chicago on February 23-25. In pursuance of the new Section 17(a) and (b) of Section X of the By-Laws, as added by the amendatory votes of the Assembly and House in Cleveland (for the text of the amendment see 33 A.B.A.J. 783; August, 1947), a Committee on Scope and Correlation of work of the Association is in process of nomination; its five members will be elected by the House, through printed or mimeographed ballots, at its mid-winter meeting, for terms of one, two, three, four and five years, respectively.

Because of the importance of the personnel and work of the new Committee, the President and Chairman of the House of Delegates have appointed a Nominating Committee, which will report ten nominations for the five places, at the opening session of the House on Monday, February 23. Further nominations may be made from the floor of the House at that time; members of the Nominating Committee may also be named from the floor.

Each member of the House may vote for five nominees on Tuesday, February 24. The Nominating Committee consists of Joseph W. Henderson, of Pennsylvania, Chairman; Charles M. Lyman, of Connecticut; Wm. Logan Martin, of Alabama; James R. Morford, of Delaware: and Sylvester C. Smith, Jr., of New Jersey. Any member of the House or the Association may submit to the Nominating Committee the names of any members of the Association whom he would regard as desirable for the Committee, or may ask any member of the House to make a nomination from the floor on February 23. Any member of our Association is eligible for election to the Committee, and need not be or have been a member of the House. The terms of those elected in February will date back to the adjournment of the Cleveland meeting; the term expiring each year will be filled by election for a five-year term.

The new Committee represents an effort for long-range and constructive planning, as well as strategic utilization of the limited resources, in the work of the Association. Under the new By-Law (Section 17(a) of Article X) the Committee will be

> charged with the duty of making such recommendations to the House of Delegates or to the Board of Governors or both from time to time as it deems to be advisable, in the interest of better correlation of the Association's work as a whole and the better utilization of the Association's resources. The Committee shall be responsible to the House of Delegates and shall have no duties or powers except those of studying the Association's work as a whole and making recommendations on the matters hereinbefore provided.

7

"Lawyer Schools" or "Policy Science"?:

Yale Law Faculty's "Manifesto" Stirs Debate

■ Nation-wide attention among members of the profession of law, and other citizens as well, was attracted by the communication sent on November 26 by the Faculty of the Yale University School of Law (twenty-two of its twenty-six full-time members), to The President of the United States, the Secretary of State and the Speaker of the House of Representatives, urging that the House abolish its Committee on Un-American Activities and that The President and Secretary of State "revise their present policy with regard to governmental employees suspected as disloyal or as security risks". Because of the public importance of the questions on which the Faculty of Law stated its collective views and because of the questions raised by such actions, we publish the communication in full, with comment as to its circumstances and significance.

■ The "manifesto" was not signed by Professor Hessel E. Yutema, or Filmer S. C. Northrop, nor by Professors Edwin Borchard, nor by Professor Harry Schulman who is on leave, nor by Professors Harold D. Lasswell or Roscoe T. Steffen who are engaged in work for the federal government.

Coming soon after the issuance of the September number of the *Yale Journal* containing an article by Professor Myres S. McDougal, one of the signers, on "The Law School of the Future: From Legal Realism to Policy Science in the World Community," the "manifesto" has been widely looked on as a significant development reflecting a concept of the role and function of a law school and its faculty in the present-day world. Professor McDougal summarized "a proposed re-orientation of legal education", to go beyond what he called "the destructive phase of legal scholarship". He suggested specifically "its present impacts on the Yale Law School curriculum", to serve the new function of "policy science" as a law school objective.

Before quoting the "manifesto" in full, we think it fair to point out that Professor McDougal's concept of what the law school should do seems hardly to be that urged by United States Circuit Judge Jerome N. Frank in his brilliant article, "A Plea for Lawyer-Schools", in the same issue of the *Yale Law Journal.* It is hardly the objective primarily sought by Professor John S. Bradway, of the Duke University Law School, or by Phil Stone, an alumnus of Yale Law School, in his editorial contributed to our May issue (page 470) which advocated that law schools should teach "lawyering" rather than merely legal philosophies and rules. Judge Frank recommends the reading of Professor Bradway's book, *Clinical Preparation for Law Practice* (1946). Worthy of note is the fact that in the same issue, the *Yale Law Journal* gives opposing views, or different facets of opinion, on the central issue.

"Policy Science" as Law School and Law Faculty Function

The concept of "policy science" as a law school and law faculty function presents challenging questions, as to which many members of the Bar will wish to read Judge Frank's and Professor McDougal's articles, as well as the recent "manifesto", and form their own conclusions. The JOURNAL has adverted to essentially the same question before, when an issue of a law school review was devoted wholly or principally to the presentation of a particular "policy" or point of view as to pending questions of federal legislation in a field of public policy. (See Editorial: "The Confrontation of Opinions"; 33 A.B.A.J. 1021; October, 1947.) Collective action by law school faculties on controversial or political questions, not directly involving academic freedom or the preservation of institutions of learning, may be challenged by many members of our profession.

As to the two matters discussed in the communication emanating from the Yale Law School faculty, the JOURNAL's opinion was stated for consideration in our November issue (page 1119). "A Congressional Hearing Is Not a 'Trial' in 'Court'." As to other, the question may be raised

whether a distinction has been heeded between the government employee (in the State Department, and elsewhere) and the private citizen, as to the right to freedom from governmental inquiry as to his political theories at a time when the governmental employee may hold beliefs which might lead him to act along lines which the energies and funds of our government are being enormously expended to forestall. Question has also been raised as to whether the "manifesto" takes account of and does justice to the action of The President and the United States Civil Service Commission and the high character and known independence of the judges and lawyers comprising the "review" tribunal that has been set up as reported in our December issue (page 1215). It has been reported that the suspect employees of the State Department have been permitted to resign from it and that most or many of them have been re-employed by the federal government.

In any event, because we believe it to be a challenging and significant development, we publish the communication as it was sent to the JOURNAL by Dean Wesley A. Sturges, member of our Association since 1932 and a valued member of our Advisory Board:

YALE UNIVERSITY SCHOOL OF LAW

November 26, 1947

The President of the United States
The Secretary of State
The Speaker of the House of Representatives

Sirs:

It is clear both from the bold and forthright report of the President's Committee on Civil Rights and other facts of common knowledge that the liberties which have so long distinguished our nation are in danger from within, as well as from without. Irremediable tragedy only can result if the advice of the President's Committee is ignored. We the undersigned members of the Yale Law faculty take this opportunity to urge immediate and decisive action. This nation needs not alone to be reminded that our government is one fashioned for courageous men, who prefer the conceded hazards of living in liberty to the indignities of the police state; it needs also to reaffirm its faith and to secure its freedoms by vigorous and appropriate measures now.

We are not insensible that in a world becoming increasingly divided, our government must take all rational precautions against acts which threaten, or seem to threaten, our national security and existence. Precautions cease to be rational, however, when they defeat the very ends they are designed to secure. We need not create a police state to escape a police state. It can make little difference to the citizen who loses his liberties and dignities as a human being whether his loss comes from an enemy or from a native oppressor who subverts democratic government in the guise of protecting it.

There is in our history no evidence that our faith in freedom of thought and speech is not well founded. For a hundred and fifty years the most violent dissidence of political expression has been allowed, not only as a monument to "the safety with which error of opinions may be tolerated when reason is left free to combat it," but in the abiding belief that "the ultimate good desired is better reached by free trade in ideas." It is not now apparent why the American people should be so wanting in courage or so skeptical of our foundations as to fall victim to the fears of frightened men either inside or outside the government. It is, however, unhappily true that America appears to be embarking on an era similar to that which followed the first World War. There are alarming signs that persecution for opinion, if not soon curbed, may reach a point never hitherto attained even in the darkest periods of our history. With it, we may expect racial, religious and every other kind of bigotry which, if it is to run its full course, can loose such a flood of intolerance as utterly to destroy the civil liberties without which no democratic society can survive.

A pattern of suppression is today evolving at the highest levels of the Federal Government. The more alarming aspects of the situation include the President's Loyalty Order of last spring, the recent "State of Security Principles" by the Department of State and the current performance of the Un-American Activities Committee of the House of Representatives. The procedure followed by the Committee and that prescribed by the Order and the Statement are such as to subject the citizen to intimidation and abuse without redress and to expose the government worker to loss of reputation and livelihood without the opportunity to defend his honor or his job.

It is the right and the heritage of every American freely to form political opinion and to express it; when accused of offense, to be presented with the charges against him, confronted by his accusers and given a fair opportunity to defend himself before an impartial tribunal. Under the cloak of Congressional immunity or the cloak of anonymity, high officials of the national Government are today acting in disregard and in defiance of the American tradition of civil liberties and, in our considered judgment, in violation of the Constitution of the United States. It is, we believe, high time that the executive and legislative branches of the United States Government foreswear belief in witches and, by practicing democracy, set an example to those parts of the world which we hope to have embrace its principles. We, therefore, urge (1) that the House of Representatives immediately abolish its Committee on Un-American Activities and (2) that the President and Secretary of State revise their present policy with regard to governmental employees suspected as disloyal or as security risks, so as to bring that policy into conformity with both the spirit and the letter of the United States Constitution.

Very truly yours,

FRED RODELL	WESLEY A. STURGES
RALPH S. BROWN, JR.	BORIS I. BITTKER
THOMAS I. EMERSON	GEORGE D. BRADEN
EUGENE V. ROSTOW	HENRY A. FENN
S. E. THORNE	GRANT GILMORE
JAMES WM. MOORE	FRIEDRICH KESSLER
A. G. GULLIVER	EDWIN BORCHARD
GEORGE H. DESSION	MYRES S. MCDOUGAL
F. S. C. NORTHROP	ADDISON A. MUELLER
WALTON HAMILTON	DAVID HABER
FOWLER V. HARPER	FLEMING JAMES, JR.

Significant Issue as to the Role of Law Schools and Faculties

Our readers will recognize readily the deep-rooted issue which the incident raises as to the place and part of law schools in legal education, the profession, and in the American system of justice under law. The Yale Faculty of Law has labored long and hard in its consideration of the functions of a law school and faculty. As citizens and lawyers, they are generally of one mind, that regardless of traditions they are not to be deemed doomed to "the monastic life" and that they should contribute collectively their thoughts and judgments to the end that our democratic scheme of government

may be perpetuated and enabled to function adequately within its constitutional objectives. They seek to prepare and train young men and women to do individually in the modern society what they have done in the name of the school in this instance; viz., to form and express considered opinions on even the most controversial of "policy science" questions that have legal aspects.

On the other hand, the faculties of some law schools have consistently taken the stand that they will not issue "faculty statements". An individual member of the faculty, or a group of two or three, may issue statements of individual opinions, just like any other citizen, by themselves or in association with professors in other schools or otherwise. Faculty members do not make a statement in the name of the school or in such collective numbers that it would or might be attributed to the school. The view in such institutions is that such a statement should have weight, if at all, by the force and reason of its arguments and not because the name and prestige of the school is brought into it and put behind it.

Along with this goes a deeply-held belief that a law school is something bigger and more lasting than any of its faculty, or all of its faculty, at any given time, and that the faculty is only a part of an institution which belongs also to its alumni, its students, its traditions and honorable history, the university of which it is a part, and the profession and the Courts and the public which it serves.

Court Considers "Free Speech" and the Investigation of Propaganda

The division of opinion as to the Yale Law Faculty's grounds for urging the abolition of the Thomas Committee extends into the United States Circuit Court of Appeals for the Second Circuit. On December 9, the Court had before it an appeal from the conviction of one Leon Josephson, formerly of the New Jersey Bar (Trenton), who had been summoned before a sub-committee of the Thomas Committee inquiring as to Communist activities, had endeavored to get a lengthy statement into the record, but had refused to be sworn and answer questions. For this he had been indicted, convicted, and sentenced to prison.

The two-to-one decision of the Court upheld the conviction. The majority opinion was written by Judge Harrie B. Chase, of Vermont, and was concurred in by Judge Thomas W. Swan, a former dean of the Yale Law School. Dissenting was Judge Charles E. Clark, also a former Dean at Yale. As to the right of the Committee to inquire into "certain types of propaganda about the potency of which there can be little doubt", Judges Chase and Swan said:

> If this propaganda takes the form of, for example, advocacy of the overthrow of the Government by violence, it is rightly called "un-American" and a sensible regard for the self-preservation of the nation may well require its investigation, with a view to the enactment of whatever remedial legislation may be needed or to the amendment thereof.
>
> One need only recall the activities of the so-called fifth columns in various countries both before and during the late war to realize that the United States should be alert to discover and deal with the seeds of revolution within itself. And, if there be any doubts on the score of the power and duty of the Government and Congress to do so, they may be resolved when it is remembered that one of the very purposes of the Constitution itself was to protect the country against danger from within as well as from without.
>
> Surely matters which potentially affect the very survival of our Government are by no means the purely personal concern of anyone. And investigations into such matters are inquiries relating to the personal affairs of private individuals only to the extent that those individuals are a part of the Government as a whole.

As to the argument for Josephson that the purposes of the committee are not to prepare legislation but to "expose the political beliefs and affiliations of individuals and groups", Judge Chase referred to the statement of The President's Committee on Civil Rights, which declared:

> The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups.

WESLEY A. STURGES
Dean, Yale University School of Law

In his discussion of the right of "free speech" Judge Chase said that if the First Amendment of the Constitution can be construed to prevent the Congress from investigating propaganda, then "the Constitution itself provides immunity from discovery and lawful restraint for those who would destroy it". Legislation curbing "free speech" when that speech imperils the country, might ultimately be the only means for the preservation of free speech.

Judge Clark declared in his dissenting opinion that "no more extensive search into the hearts and minds of private citizens can be thought of or expected than that we have before us", and added. "If this is legally permissible, it can be asserted dogmatically that investigation of private opinion is not really prohibited under the Bill of Rights. In other words, there will then have been discovered a blank spot in the protective covering of that venerated document". There has been no definition of the "key word un-American" in the resolution setting up the House Committee; and "a widespread belief that the Committee is acting in an un-American way to even an American end will destroy the Committee's usefulness in the eyes of 'liberty-loving people' ".

8

Reginald Heber Smith Succeeds Vanderbilt as Director of Survey

■ Reginald Heber Smith, of the Massachusetts Bar (Boston), was elected on December 15 by the Council in charge of the Survey of the Legal Profession as Director of the Survey, to take the place of Arthur T. Vanderbilt, who resigned as Director upon his appointment and confirmation as Chief Justice of the Supreme Court of New Jersey (33 A.B.A.J. 1216; December, 1947). Announcement of the unanimous selection of Mr. Smith was made by the Chairman of the Council, Judge Orie L. Phillips, of Denver, Senior Circuit Judge of the United States Circuit Court of Appeals for the Tenth Circuit. Plans for the Survey were announced in our November issue (page 1075).

The new Director has for many years been active in the work of our Association, of which he became a member in 1918. He has been since 1941 a member of the Board of Editors of the JOURNAL, and is the managing partner of the Boston law firm of Hale & Dorr, Treasurer of the Harvard Law School Association, Vice President of the National Association of Legal Aid Organizations, and author of *Justice and the Poor* (1910), a pioneer treatise on the broadening duty of our profession to the public.

When the facts as to our profession are gathered and analyzed, they will be reported to the American people in a public document. To the end that this report shall be impartial and uncensored, the Director is assured the academic freedom of a legal scholar. The Council which controls the funds and must approve specific recommendations is an autonomous, independent body with power to fill vacancies, increase its membership and appoint subcommittees. The Chairman is Judge Phillips, and its Secretary is Dean Albert J. Harno, of the University of Illinois Law School, at Urbana.

Other members of the Council are Howard L. Barkdull, of Cleveland, Chairman of the House of Delegates of our Association; Professor James E. Brenner, of Stanford University, Chairman of the California Board of Bar Examiners, and a member of the Board of Editors of the JOURNAL; Dr. John S. Dickey, President of Dartmouth College; Paul G. Hoffman, President of the Studebaker Corporation, and Chairman of the Committee on Economic Development; William Clarke Mason, member of the Board of Governors of our Association, former Chancellor of the Philadelphia Bar Association and former President of the Pennsylvania Bar Association; Carrol M. Shanks, of Newark, President of the Prudential Insurance Company of America; Mr. Smith; and Judge Vanderbilt, formerly Dean of the New York University School of Law, now Chief Justice of New Jersey. Our Association's President, Tappan Gregory, of Illinois, is an *ex officio* member of the Council during his term of office. The Treasurer who has custody and disbursement of funds of the Survey is Walter M. Bastian, of Washington, D. C., also Treasurer of our Association.

In the "President's Page" in this issue, President Gregory comments on the circumstances and significance of Mr. Smith's acceptance of the Directorship of the Survey.

REGINALD HEBER SMITH

9

The Bill of Rights:

The Decision in *Adamson* v. *California*

by **Frederic R. Coudert** • of the New York Bar

■ On Sunday afternoon, December 14, in the historic St. Paul's Church in Eastchester (Mt. Vernon), New York, where first battles for American freedom were waged, and in countless other communities throughout the land, the 156th anniversary of the ratification of the Bill of Rights thereby added to the Constitution was celebrated. Surprising and disturbing is the fact, brought to attention by Mr. Coudert, that after 156 years a majority in the Supreme Court of the United States, by its decision in *Adamson* v. *California*, 332 U. S. 46 (33 A.B.A.J. 928; September, 1947), has left in doubt the question as to how far the Fourteenth Amendment carries the Bill of Rights with it and what rights of individuals will be regarded by the Court as entitled to constitutional protection. John Adams assured the people: "You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe". Are those rights so clear and unmistakable today?

The problems posed by Mr. Coudert are of fascinating interest and practical importance. What distinctions are to be drawn between individual rights enumerated in the Constitution? Which rights of persons are "fundamental" and which are "procedural"? Is this to be decided by the Court's view at a given time as to what violates "today's fashion in civilized decency and fundamentals"? What weight has the doctrine of *stare decisis* as to human rights? Mr. Justice Black's strong dissent, with which three others concurred, says that the *Adamson* decision reasserts a constitutional theory "that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice' ".

■ Few subjects, if any, have been of wider interest, especially since World War I and increasingly since World War II, than the "rights of man". Many institutions, private and quasi-public, have undertaken to make a category of those rights. I cannot say that their efforts have as yet been crowned with singular success.

In 1929 *L'Institut de Droit International,* composed of famous jurists from the civilized states of the world, had a session in New York, after debates in committee for several years. The *Institut* finally formulated a catalogue of rights. Later a similar work was undertaken by the American Law Institute, but there were diverse opinions and the outcome did not meet with definite approval by the Bar. The UN has a special Commission on Human Rights, has given the subject much attention, and is now struggling with formulations in Geneva. The latest work, by Professor Lauterpacht of England, *An International Bill of the Rights of Man* (reviewed in 31 A.B.A.J. 531; October, 1945 issue) treats the subject with clarity and ability.

Since the adoption of our own constitutional Bill of Rights, social and economic changes have made difficult the task of formulating any new Bill of Rights. Our Bill of Rights was adapted to a society based upon the freedom of the individual, a society in which the elements referred to played little part in comparison with the attempt to formulate the legal rules necessary to maintain human liberty as against a tyrannical government. Thomas Jefferson thought little of any Constitution that did not provide such safeguards. As he said in a letter to Madison:

> A Bill of Rights is what the people are entitled to as against every Government on earth, general or particular.

The question of the existence of natural rights and of natural law ascertainable by man is a very old problem. It goes back at least 2000 years to the beginnings of Stoic philosophy, which developed the concept of natural justice and right. As Judge Robert N. Wilkin showed in his classic book, *Eternal Lawyer,* Cicero made it the basis of his essay on *Duties*; the Christian Church from early time has maintained its existence and obligation. The French revolutionaries proclaimed the rights of man in their fundamental declaration, and the extraordinary career of Thomas Paine indicates how wide was the attention

given to the subject in the later days of the Eighteenth Century in England as well as in the United States, where it formed the basis of the Declaration of Independence. We lawyers have been accustomed to look at the matter from a less philosophic standpoint than the theologians and reformers.

Early Decisions as to Rights Enumerated in Bill of Rights

In our Constitution the Bill of Rights embodied in the first ten Amendments was unique in that violations were made a matter of law, not of mere policy, so that persons in America might appeal to the Courts for vindication of those definitely enumerated rights. It is thus of considerable interest to find that our Supreme Court has discussed the problem very recently in *Adamson* v. *California,* 332 U. S. 46, with various opinions presenting still divergent views of the content of such rights.

In the famous case of *Barron* v. *Baltimore,* 7 Peters 242; January, 1833, it was decided that the Bill of Rights was operative only as against the federal government and that the fundaments of human liberty were to be safeguarded by the States. This was of course due to the then prevalent belief that the danger to civil liberty lay in the encroachments of the federal government on the rights of the States and the individual. The clause in the Constitution which entitles the people of each State to the rights, privileges and immunities of citizens of the several States had been very narrowly construed by the Court as conferring rights incident to federal citizenship, such as access to the Capital, petition to the federal government, etc. This view did not seem to provoke much controversy or difficulty.

Did the Fourteenth Amendment Encompass the Bill of Rights?

The Fourteenth Amendment, in ordaining that "no State shall deprive any person of life, liberty or property without due process of law", was thought to have annulled the doctrine of *Barron* v. *Baltimore, supra,* and to have made the Bill of Rights effective as against the State, thus in effect nationalizing civil liberty. This view was not held by the Supreme Court in the *Slaughter-House Cases.* In later rulings such as *Maxwell* v. *Dow,* 176 U. S. 581, *Hurtado* v. *California,* 110 U. S. 533, and *Walker* v. *Sauvinet,* 92 U. S. 90—1875, it was held that indictment by a grand jury and trial by common law jury were not rights to be enforced against State legislation providing for criminal prosecution through other means. "Due process in the States is regulated by the law of the States".

In *Twining* v. *New Jersey,* 211 U. S. 78—1908, the Court held that the privilege against self-incrimination was not immune from abrogation by the States, on the ground that

> *The first eight Amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited State action it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first eight Amendments.* (Italics mine)
>
> The words "due process of law" as used in the Fourteenth Amendment are intended to secure the individual from the arbitrary exercise of powers of government unrestrained by the established principles of private right and distributive justice, *Bank* v. *Okely,* 4 Wheat. 235, but that does not require that he be exempted from compulsory self-incrimination in the Courts of a State that has not adopted the policy of such exemption.

The *Twining* case, decided nearly forty years ago, was supposed to have settled the question and left the rights of the individual against a State to be determined, not by the language employed in the Bill of Rights, but by the Supreme Court upon considerations of what it thought to be fundamental or natural rights. As each case involving a claim of right under the Fourteenth Amendment arose, the question was to be determined by the views of the then members of the Court as to what constituted these fundamental rights.

Distinctions Between Rights Enumerated in the Constitution

The suggestion that there was a distinction between natural rights and methods of procedure as both appeared in the constitutional Bill of Rights, had been made in the Supreme Court by Mr. Justice Brown as early as 1900. In *Downes* v. *Bidwell,* 182 U. S. 280-282, he stated:

> There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.
>
> We suggest, without intending to decide, *that there may be a distinction between certain natural rights,* enforced in the Constitution by prohibitions against interference with them, *and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence.* (Italics mine.)

Speaking again in *Mankichi* v. *Hawaii,* 190 U. S. 197, as to whether a trial in Hawaii after its annexation to the United States was valid in the absence of an indictment and jury trial, he said:

> . . . *we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure.* . . . (Italics mine).

That philosophic-minded jurist, the late Mr. Justice Cardozo, treated the matter in his own felicitous fashion in *Palko* v. *Connecticut,* 302 U. S. 319:

> . . . The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. . . .
>
> So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the States, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. . . . liberty is something more than exemption from physical restraint, and (that) even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the Courts.

Justice Cardozo concluded that the test is whether the law or regu-

lation challenged is in violation of "those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions."

Grounds of Majority Decision in Adamson Case Last June

The decision of the majority of the Court in the *Adamson* case, delivered by Mr. Justice Reed on June 23, 1947, was based mainly on the rule of *stare decis*. He said:

> The *Twining* case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against State invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against State action. . . .
>
> It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and State power. We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

Mr. Justice Frankfurter, writing a concurring opinion, said:

> Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After enjoying unquestioned prestige for forty years, the *Twining* case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* case intact, I would affirm this case on its authority.

With his usual acumen and delight in juridicial concepts, he adverted to the theory underlying the policy of of the Court.

> In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.

Grounds of Dissent by Four Members of the Court

Mr. Justice Black, in a full and erudite opinion, differed fundamentally from the majority of the Court. He restated the view, so emphatically set forth by Mr. Justice Harlan years before in *Hurtado* v. *California* and other cases in that category which came before the Court in his time. Mr. Justice Black insisted that:

> This decision reasserts a constitutional theory spelled out in *Twining* v. *New Jersey*, . . . that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice." Invoking this *Twining* rule, the Court concludes that although comment upon testimony in a federal Court would violate the Fifth Amendment, identical comment in a State Court does not violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the Federal Constitution as amended.

After reviewing the cases upon the subject, Mr. Justice Black concluded that at no time had any searching examination been made of the debates in the Congress which formulated and passed the Fourteenth Amendment. He annexed to his opinion a valuable summary of those debates, which seem to me to make it clear that the purpose of the leading proponents of the Fourteenth Amendment was by no means of that amendment to supersede the decision in *Barron* v. *Baltimore* and to nationalize civil liberty by making the Bill of Rights of the United States Constitution, admittedly applicable to the federal government, equally applicable to denying action by a State. Justices Douglas, Murphy and Rutledge were in substantial agreement with Justice Black.

FREDERIC R. COUDERT

If this opinion came to the knowledge of the shades of Mr. Justice Harlan, it must have brought satisfaction to that vigorous, consistent dissenter in this class of cases. His oft-repeated phrase that a question was never settled until it was settled right seems to be in process of justification in this particular.

Regrettable Uncertainties Still Exist as to Protected Rights

Lawyers may well differ regarding this fundamental question; but it does seem unfortunate that some eighty years after the passing of the Fourteenth Amendment, there should still be doubt as to what rights it was intended to protect. If

Concerning the Author: Frederic René Coudert is one of the most highly respected of American lawyers, in his own country and abroad. Born in New York City in 1871 and educated at Columbia University, he has practiced law continuously since his admission to the New York Bar in 1892. He has achieved distinction in international law as well as constitutional and civil law, and has been adviser to many governments, including that of the United States. A member of our Association for forty-five years, he has attended many of its meetings and has contributed articles, book reviews, and signed editorials to the *Journal*. In our June, 1947, issue (page 592), he reviewed Judge Robert N. Wilkin's *Eternal Lawyer: A Legal Biography of Cicero* (Macmillan). He is a member of our Advisory Board.

we are to adhere in questions of constitutional interpretation to the rule of *stare decisis*, the matter is clear enough. If, however, as has been rather frequently and freely stated of late years, constitutional interpretation is largely freed from that rule and must be brought into conformity with what a majority of the Court declare to be the ideas and opinions of the day, the situation is otherwise.

I can easily conceive that certain prohibitions in the Bill of Rights are matters of procedure rather than of substance and are derived from English law and practice almost exclusively. On the other hand, should the Supreme Court be called upon to apply this view of the law of nature or the "rules of civilization and decency", each time the matter comes before them? In other words, are they to ascertain what they think is the opinion of the day and follow its shifting views of natural or human rights?

While I have no particular quarrel with the rather vague and differently interpreted phrase "natural law", I realize that it has played an important role in history and may be said to be a part of civilized man's consciousness and the motivation of much of what is best in positive law. On the other hand, if there be any value whatever in preserving some certainty as an element in constitutional law, it might have been as well if the Supreme Court at the time of the decision in *Hurtado* v. *California* had adopted the views now propounded by Mr. Justice Black and three of his associates in the Supreme Court, and so long and earnestly insisted upon by Mr. Justice Harlan.

Lawyers and Bar Associations Should Express Their Views

We have learned that constitutional amendments are not so difficult as to be practically unobtainable, and it might have been possible to amend the constitutional Bill of Rights if necessity seemed to dictate it. On the other hand, we have done tolerably well with it in the federal Courts; and I am not sure that it would have been catastrophic to have applied it to the States. This, it seems to me, is a question to which thoughtful lawyers might give attention and as to which Bar Associations might well express their reasoned views.

If the writer has been interested in the current question, it is in part because of the fact that many years ago he wrote articles in the *Yale Law Review* in which he criticized the doctrine propounded in *Hurtado* v. *California* and similar cases. (See "Certainty and Justice", by Frederic R. Coudert). He might today treat the question less dogmatically, but evidently the problem is still very much alive.

A Lawyer's Duty as to a Retainer in an Unpopular Case

■ A shining, concrete example of what an American lawyer feels called upon to do in behalf of justice and fair play, when he is asked to accept a retainer in a perhaps unpopular cause, is worth more in our profession than abstract canons. On December 2, Mr. Justice Frankfurter of the Supreme Court of the United States published in the Boston *Globe* a letter concerning the late Arthur D. Hill, of the Massachusetts Bar (Boston), who died on November 29. The account given as to what Arthur Hill said when he took the retainer in the Sacco-Vanzetti appeal, deserves a place in the annals of our profession, because it fulfills what Sir Norman Birkett and other great advocates have lately said as to the lawyer's duty. Mr. Justice Frankfurter wrote:

> *To the Editor*—Through various important services, Arthur D. Hill proved himself a notable citizen. But he deserves especially to be remembered for his significant contribution to civil liberties.
>
> As good a test as any of a civilized society is the treatment accorded to those accused of crime. The more fair-sounding the provisions of a Bill of Rights, the more it constitutes merely mocking rhetoric unless its professions are translated into the daily administration of justice so that the lowliest of creatures may have ample opportunity to prove their innocence.
>
> Nothing is farther from my mind than to stir the dead embers of a tragic controversy. But I think it is important for the traditions of the law and of this Commonwealth now to make public the circumstances under which Arthur Hill became counsel for Sacco and Vanzetti in the final stages of that affair.
>
> The time had come when Mr. William G. Thompson had exhausted his energy in his powerful devotion to the cause of the men, and yet appeal to available legal process had not come to an end. The men were entitled under due process not to go to their death until every avenue of relief afforded by law had been pursued.
>
> It was at this stage that I was asked if I would try to enlist Mr. Hill's legal services to undertake a final effort on behalf of the men, hopeless as it seemed by appeal to the federal law. I saw Arthur Hill, told him the situation and, more particularly, that if he undertook this thankless task it would have to be solely as an exercise of the public profession of the law, for it would have to be done without a fee.
>
> Without hesitation he made an answer that deserves permanence in the history of the legal profession. This is what he said:
>
> "If the president of the biggest bank in Boston came to me and said that his wife had been convicted of murder, but he wanted me to see if there was any possible relief in the Supreme Court of the United States and offered me a fee of $50,000 to make such an effort, of course I would take the retainer as would, I suppose, everybody else at the Bar. It would be a perfectly honorable thing to see whether there was anything in the record which laid a basis for an appeal to the federal court.
>
> "I do not see how I can decline a similar effort on behalf of Sacco and Vanzetti simply because they are poor devils against whom the feeling of the community is strong and they have no money with which to hire me. I don't particularly enjoy proceedings that will follow, but I don't see how I can possibly refuse to make the effort."
>
> FELIX FRANKFURTER

10

Treatment of Witnesses:

Laymen's Suggestions for Better Handling

by Philip L. Graham • Publisher of the Washington *Post*

■ A significant development recently in the work and processes of Bar Associations has been the obtaining of information and judgment from non-lawyers as to the functioning of Courts, the administration of justice, and the means of improving them. This course of action has lately been extended to some of the Judicial Conferences convened in the federal Circuits, as reported from time to time in our columns. These accessions of independent opinion and informed judgment, from the public which is served by the Courts and the Bar, have already had noticeable impacts upon both procedure and the attitude of mind in which the business of the Courts is carried on.

A constructive statement as to the treatment of civilian witnesses was prepared by a sub-committee of non-lawyers and submitted to the Judicial Conference for the District of Columbia. Its over-all point of view may perhaps be summed up as suggesting that better "public relations" for the administration of justice can well be cultivated by the Courts and the Bar, and that the treatment accorded to civilian witnesses should improve, not alienate, the good opinion and respect which the public has as to the work of the Courts. There was a great deal of perspective, balance and good sense in Mr. Graham's statement.

■ A preliminary examination as to the treatment of witnesses, made by our Sub-Committee for Improvement in Methods of Handling Civilian Witnesses, showed: (a) That accommodations at the courthouse are bad and that only a new courthouse would improve the situation, and (b) That there is considerable criticism of the delays in trials, especially criminal cases.

With respect to delays, this preliminary examination showed many contributing causes:

(1) Defendants often enter unexpected pleas of guilt, thus obviating the need for witnesses after they have gathered in the courthouse.

(2) In some cases, the material witness, often a Government witness, fails to appear, thus preventing trial of the case although several other witnesses in it are actually on hand.

(3) In order to keep judges fairly busy, more cases are usually scheduled for a day than are likely to be tried.

(4) The lack of a central witness room in which witnesses can gather is inefficient and contributes to the waste of time.

(5) There is a natural tendency of the defense counsel to take advantage of these delays.

These are only tentative and preliminary indications. We realize that there are in many instances compelling and justifying reasons for these delays. Thus we realize that the state of the docket is much more current than a few years ago; and we realize this was brought about by the intensive scheduling of cases for trials, which sometimes causes delays. From this preliminary examination, our Sub-Committee hopes to make some suggestions. Of necessity, we intend to limit our suggestions to administrative aspects of the treatment of witnesses.

Some Fields for Improving the Treatment of Witnesses

But while our Sub-Committee will limit its field to mechanical and administrative arrangements, it seems to me there are fields for improving the treatment of, and contributions by, witnesses, which deserve continuous examination by Courts and the Bar. These in the main have to do with treatment of the witnesses during trial—in the qualitative courtroom treatment.

Our English cousins seem even a bit more retarded on this than we. Thus a recent British law review article contains a lawyer's protest against "the unshakable conviction that a witness only tells the truth when on his feet and will immediately commit perjury if allowed to sit". The author says that witnesses in some British Courts are allowed to sit only if very old or sick, or "ready to sink to the floor after a gruelling cross-examination". He further criticizes judges who, he claims, will pounce on a witness for

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being informally attired or for nervously putting his hands in his pockets.

While our informality may stand in progressive contrast, there nevertheless seems to be widespread reluctance by many Americans to undergo the ordeal of being a witness. A popular magazine article has indicated some of the popular fears of being a witness. People, the author says, "hear of lawyer-magic that makes honest men look like lying knaves . . . They hear of witnesses tortured for hours by crafty cross-examiners, some even imprisoned for perjury".

Another complaint has, it seems to me, summed up a general attitude which is within the power of the Courts and the Bar to correct: This author writes of the belief that being a witness is "like being forced into a contest against skillful opponents while knowing none of the rules."

Methods of Interrogation Have Long History and Experience Behind Them

I realize that the problems of interrogation have long histories and present complex issues. And I realize that many factors in the courtroom drama are shaped by long experience in how best to get at the truth and also how best to preserve the individual liberties accorded defendants and witnesses in the Constitution.

But there is considerable evidence that the public has serious doubts about the necessity of a great deal of the dramatics of trials. And there is very serious, really shocking, evidence that the public doubts how efficient you actually are in getting after the truth. Thus Arthur Train has written in a popular book that "anywhere from a quarter to seventy-five per cent of the testimony offered by the defendant's witness upon the direct point at issue in the ordinary run of criminal trials is perjured."

It is hard to see how any such estimate could be thus mathematically expressed. However, the public views current trials and seems to agree. They wonder how efficiently you are striving to improve the means for getting at truth.

Matters as to Which Laymen Can Offer Improvements

So far, I have tried to make two points:

(1) That there is possible merit in having suggestions from laymen in improving the handling of witnesses, but that laymen had best stick to mechanical and administrative problems—such as the accommodations and pay offered witnesses at the courtroom and the amount of delay caused in using witnesses.

(2) That there is room for improvement in handling witnesses during a trial, and that this is a field calling for continuing action by the Courts and the Bar.

In this second matter, you have, it seems to me, what has come to be known as a "public relations problem". There seems to be need for increasing public confidence in the administration of justice in two directions:

(1) Those individuals among the public who may be called as witnesses need to be assured of fair treatment—assured that they will not be tricked or duped and harassed in examination and cross-examination; that they will only be called on to give as painlessly and as easily as possible their contribution to getting at the truth in the case at bar.

(2) The public taken as a whole needs to be convinced that the judiciary and the Bar is constantly striving not merely to play an adversary game, but to establish truth and thereby direct justice as near as may be possible.

Meetings such as this and the formation of laymen's committees are a start on this process. But it would appear that a great deal can be done.

Better "Public Relations" on Administration of Justice

Some schools are already holding model trials to educate our children regarding the principles of our judicial system. The Bar Associations can help in developing and extending this method of education.

In regard to individual witnesses some lawyers have urged that they be given instruction of their rights and duties, either through written instruction sheets or through talks by the judge. Other lawyers think you can develop more pre-trial activity in criminal cases, in order to save witnesses from delays and confusions over the admissibility of documents and the like.

It seems to me that you have need of using these devices, along with the whole armory of public relations techniques, to get across better understanding—better public rela-

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Concerning the Author: Philip L. Graham was born in Terry, South Dakota, on July 18, 1915. He attended public schools in Miami, Florida, and the University of Florida, and was graduated from Harvard Law School in 1939, where he was Editor of the *Harvard Law Review*. He served as law secretary for one year each under Mr. Justice Stanley Reed and Mr. Justice Felix Frankfurter of the Supreme Court of the United States. In 1941 he entered the General Counsel's Office of the Lend-Lease Administration and the Office of Emergency Management. In 1942 he went into the Army Air Forces as a private. He was commissioned in 1943, served with Military Intelligence, and was later attached to Headquarters of the Far East Air Forces in the South Pacific. He was discharged from the Army as a Major.

Mr. Graham did not return to the law. He became Associate Publisher of the Washington *Post* on January 1, 1946 and its Publisher in June of the same year. He is the President of WINX Broadcasting Station.

tions—on the administration of justice.

The problem is somewhat new to you. But it is not new. Other branches of government use public relations methods to inform the citizen. Industries, labor unions, citizens' associations, all other organizations, use them. But you must remember the first rule of public relations: "You can't make a silk purse out of a sow's ear". Unless the Courts and the Bar are actually taking progressive action to improve the administration of justice, you cannot expect public understanding and support.

11

March 19 the Effective Date of Amendments of Rules of Civil Procedure

▪ Interesting constitutional and parliamentary questions arose as to whether or not the first session of the 80th Congress was terminated last July 27, and so as to whether or not the meeting of the Congress on November 17 at the call of the President was a "special session" or a continuation of the first session. Involved in the issues was the effective date of the amendments of the Rules of Civil Procedure, prepared by the Advisory Committee and approved by the Supreme Court.

On January 3, 1947, the Attorney General reported to Congress at the beginning of the first regular session of the 80th Congress the various amendments of the Federal Rules of Civil Procedure as adopted by the Supreme Court in its order of December 27, 1946, pursuant to the Act of June 19, 1934 (48 Stat. 1064, 28 USC, Sec. 723c). Rule 86 (b), as amended, provides for the effective date of the amendments and reads in part as follows:

> The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the Eightieth Congress; but if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947.

This is in accord with the terms of Section 2 of the Act of June 19, 1934, which provides that the rules "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

The Senate and House of Representatives, sitting in the first regular session of the 80th Congress, adjourned pursuant to Senate Concurrent Resolution 33 as amended, on July 27, 1947, to January 2, 1948, or to an earlier date on notification by the President *pro tempore* of the Senate, the Speaker of the House, and the majority leaders of the Senate and House, all acting jointly. The terms of the Resolution made it evident that the adjournment on July 27 was more in the nature of a recess and was not a final adjournment of the first regular session. Senate Joint Resolution 156, as enacted, fixed the date of the meeting of the second regular session as January 6, 1948. Accordingly, the conclusion has been that the adjournment on July 27 was not the kind of final adjournment, ending the first regular session, as was contemplated by Rule 86 (b), and that the amendments to the rules did not become effective on October 27, 1947, and will not become effective until three months after an adjournment *sine die* of the first regular session.

By proclamation of October 23, 1947, the President declared that an "extraordinary occasion" required that the Congress convene on November 17, 1947 (12 *Fed. Reg.* 6941). This meeting of the Congress was called by the President in the exercise of his powers and not by Congress itself pursuant to the terms of Senate Resolution 33. The question then arose as to the character of the session begun on November 17, for the answer to that question indicates the time from which the three months prescribed in Rule 86 (b) will begin to run. The view of Director Chandler of the Administrative Office of the United States Courts, and the advice of the Federal Law Section of the Library of Congress, and the parliamentarians of the two houses, were that the meeting on November 17 was a resumption of the first regular session; that since the Congress had reassembled earlier than January 2, 1948 (the date set for the resumption or final adjournment of the first session), the latter date had no further significance.

In a carefully considered opinion on November 18, United States District Judge Charles Wyzanski, in Boston, held that Rule 86 (b) contemplated an adjournment *sine die* and that the adjournment of the Congress on July 27 did not start the time running as to the amendments of the Rules (*Ashley* v. *Keith Oil Corp.*, 10 Fed. Rules Service, 86 (b) 21 (D. Mass.).)

On Friday, December 19, pursuant to House Concurrent Resolution No. 127, the first session of the 80th Congress adjourned *sine die*, "notwithstanding" the earlier fixation of the January 2 date; and the second regular session convenes on January 6. According to all contemporary evidence and the prevalent opinion, the amendments of the Rules of Civil Procedure become effective three months from December 19; viz., on March 19, 1948.

12

American Patent System:

A Bulwark of Free Enterprise and Opportunity

by William C. Foster • Under Secretary of Commerce

■ At a time when many "socialized" and collectivist countries look largely to the resources and strength of free-enterprise America to rehabilitate their shattered economies and enable them to resist Communist ascendancy and domination, inquiry is appropriate as to the reasons for America's great industrial development and capacity to aid a stricken world. At a time when it is manifest that a large part of the populations of many countries which have economic and political systems different from the American would give all they have and are to be permitted to migrate to the United States to enjoy the abundant opportunities and freedoms which flourish here, inquiry is appropriate as to any of the factors which have made and kept our country a land of opportunity for individual workers, small businesses, men and women eager to improve their stations in life. Those who would weaken or impair the American patent system are conscious or unconscious allies of the collectivism which has prostrated the economies of other Nations.

The Under Secretary of Commerce told our Cleveland meeting that the American patent system has contributed greatly to all of these boons of the private-enterprise system. He stated frankly some dangers and problems and what is being done to cope with them; he urged lawyers and their clients to help make our patent system work acceptably. Our readers generally will, we believe, be interested in this "keynote message" as to a system of law and administration which is a vital and integral part of a free America. The American Bar was honored that the meeting of its Section of Patent, Trade-Mark and Copyright Law was the forum for so notable an utterance.

■ I thought I might best contribute to your discussions by giving you the views of a person who has in the past dealt with our patent system, not as the subject of his profession, but rather as a vital benefit to his company—and at present as one of his major responsibilities. As a small manufacturer, I have known first hand the high degree of competition which constantly takes place in industry for technical improvements in production—a competition which is the foundation stone of national productivity. In my own business, in addition to our company developments, I formerly had visits from perhaps a dozen inventors a week with ideas they wanted us to finance and put into production. In other words, because I have been a part of American business which our patent system serves and am now a part of the Government which administers the patent system, I thought my viewpoint might be of interest to you.

Needless to say, I am a profound believer in both the philosophy and the fruitfulness of the American enterprise system. Within the space of a comparatively short period of time this country, within the framework of our national Constitution, has developed from a small collection of agricultural and maritime States to a position of pre-eminence among nations. At a rate unparalleled in history, we have settled a continent, developed our national resources, raised our standard of living, consistently increased our agricultural and industrial productivity, and have afforded to more men a better life, both in material and spiritual terms, than men have ever enjoyed before under any other system. Our system is by no means perfect. It is one of our virtues that we recognize its imperfections and have constantly worked to improve it. We have made and continue to make salutary changes in our institutions. At the present time, in a world threatened with chaos, suffering and even enslavement, the United States stands as mankind's greatest—and perhaps only—hope for a decent existence. Men everywhere look to the United States for leadership, and the base of leadership is our immense productivity, in agriculture and in industry.

It is this agriculture and industry which our patent system has served

so well. By offering inventors a limited monopoly to make, use and sell their inventions, the patent system has, in effect, given the American people the services of some of our most talented individuals at a low price. We enter into partnership with them for our common welfare, but make no investment beyond that of granting a charter of exclusive rights for a limited period. By offering direct rewards for individual achievement, initiative has been stimulated and thus has provided a part of the driving thrust leading to our unparalleled mastery over the forces and materials of nature. Civilization itself has been defined in terms of that mastery. In this sense the American patent system, I am deeply convinced, has been an important civilizing force.

"Keynote" Message as to the American Patent System

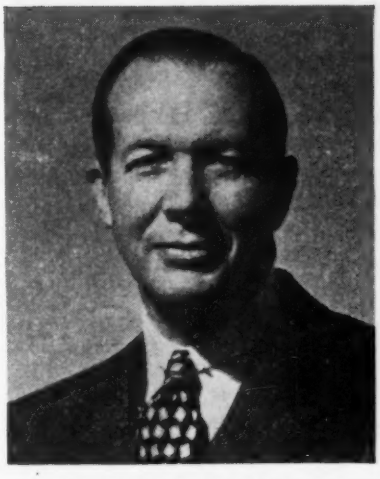
Our patent system has promoted the introduction of new ideas into industry. It has attracted capital to new enterprise. It has raised employment. It has helped raise the efficiency of labor.

Under our patent system the inventor is granted temporary but exclusive rights to his idea and is provided with a vital aid in translating his invention into a commercial reality. He may have conceived of a machine that will reduce the cost of some common article of life; or he may have developed an article to satisfy a need first felt the day that article appeared. In either case he has contributed to the increasing commerce which has made our lives so full; the competition which has placed within the reach of everyone luxuries that not even the rich a short while ago could afford; and the enterprise which in this country opens a limitless industrial frontier.

I know from my own experience that the patent system has served the small businessman well—the enterpriser who undertakes to commercialize an invention. The system gives no insurance policy against loss nor a guarantee of fortune. It merely offers the enterpriser some protection in securing capital, in getting his tooling under way, in getting his markets established. His competitors may be larger companies; they may have a variety of products that yield advantages of low selling and shipping costs and established marketing outlets. Many a growing business is here today because a patent secured to it for a time a unique product that made its way into the markets against real handicaps.

Dangers Through Monopolistic Practices and Through Delay

However, there are two aspects of the American patent system as it operates which are of concern to any business man. First is the possible use of



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patents as a monopolistic device to harass competition. In recent years the subject of so-called suppressed or abused patents has aroused much discussion and has now probably been exaggerated out of all proportion to the actual frequency of the wrongs complained of. The entire patent system has been repeatedly damned because of a few violations of the anti-trust laws, in which the violations were cloaked by patents.

Although the number of patents which have been suppressed is undoubtedly small, the records indicate that some abuse and suppression has taken place. In large part the solution to this problem rests upon the integrity of business men and their faith in the competitive system.

Concerning the Author: William Chapman Foster was born in Westfield, New Jersey, in 1897, was graduated from Kingsley School in 1914, and attended the Massachusetts Institute of Technology with its class of 1918. In his senior year he left to enlist in the Air Service and was commissioned a second lieutenant and reserve military aviator.

After his discharge, his experience was in business enterprise. In 1922 he went to work for the Pressed and Welded Steel Products Company, Inc., of Long Island City, N. Y.; in 1925 he became its Secretary-Treasurer, in 1941 Vice President and Treasurer, and in 1946 President of the Company. He went on leave of absence in December of 1946, after his appointment as Under Secretary of Commerce on November 29, 1946. He became in 1944 the Secretary and a director of the Wegner Machinery Corporation, also of Long Island City. He resigned in July of 1944 for service with the War Department. He was re-elected to his former posts in December of 1945, but again left the company a year later, although he is still a stockholder. In 1943 he was named as a director, and in 1944 as a Vice President, of the Chamber of Commerce of the Borough of Queens, New York City. In 1946 he became a trustee of the Committee for Economic Development. His legal residence for more than ten years has been in the town of Scarsdale, in Westchester County, where he has held many civic posts. From 1938 to 1940 he was President of the Point O' Woods Association, his summer home being at Point of Woods, on the south shore of Long Island. He is both a golfer and yachtsman.

From February of 1943 to the end of World War II, Mr. Foster held a variety of posts in government, mostly in Army procurements, etc., considerably related to the utilization of small business enterprises for production. He was awarded the War Department Commendation for Exceptional Civilian Service and the U. S. Medal for Merit.

Patent attorneys may also have the opportunity from time to time of suggesting a proper approach to this question on the part of some clients. In part, however, the possibility of legislative action as a last resort must be recognized. In the interests of the vitality of our competitive enterprise system as well as the prestige and usefulness of the patent system itself, monopolistic abuse of patents cannot be tolerated.

The second aspect of the patent system which has caused businessmen deep concern is the expense and seemingly interminable delays and litigation often associated with the acquisition and maintenance of patent rights. The reasons for these delays are many and complicated. As you gentlemen are aware, they derive partly from deficiencies of government, partly from practices of the legal profession and the Courts, and partly from the customs and habits of the commercial world.

Patent System Cost Must Not Outweigh the Benefits Gained

I do want to emphasize one point, namely, that the benefits of the patent system are relative to the costs of acquiring and protecting them. At some point the expense in time and money can become so great as to outweigh the benefits received. At this point the patent system would lose many of the advantages it now offers to a private enterprise economy.

American small business makes up the greater proportion of business enterprises in this country. It suffers particularly in any situation in which specialized services must be hired and in which prolonged delay and uncertainty must be undergone. The American small businessman is in many ways the backbone of our business structure. His welfare must be protected. It is on this score that I particularly urge the importance of whatever changes are necessary in the organization of the Courts, in the rules of practice of the patent Bar, and in the administrative processes of government, in order to reduce the costs, reduce the delays, and reduce the uncertainty of the patent procedure.

Congress recently, in interpreting the popular will, has directed that divisions of the government offering individual services, including the Patent Office, become self-sustaining or as nearly so as possible. In this connection the Congress has asked the Patent Office to draft a bill which would incorporate plans for increasing fees sufficiently to accomplish this objective. This bill, as you know, has been drafted and introduced. Such a request on the part of Congress is entirely proper. It points up the urgent necessity for reducing in other directions every expense associated with the acquisition of a patent.

I was conscious of the importance of reducing the expense and delays in the patent system when I was a businessman. I have become acutely aware of those problems since joining the Department of Commerce. With my transfer to temporary membership in the bureaucracy, I have had to abandon the privilege of throwing stones at the machinery and begin to think about how to improve it. I have come to the conclusion that in this immensely complex area of government, as in other important government activities, any constructive change that may be achieved will have to come through the joint efforts of men in industry, in the legal profession and in government. No single line of attack does the job.

Recent Changes in Procedures, Personnel of the Patent Office

Important changes have been made within the last two years in the personnel and procedures of the Patent Office. In the housekeeping functions of the Office, improvements have been made in the filing system and in the manner of handling the sale of documents. Changes have been made to improve both morale and operating effectiveness of the professional staff. The examiners are now paid better, trained better, and assigned more intelligently than was previously the case. However, these changes have still not licked the omnipresent and ominous problem of a growing backlog.

During the war the workload of the office dropped off, but there were also great losses and great turnover of personnel. As a result, the office was barely able, despite the lessened workload, to hold its own against the flow of incoming work. With the end of the war, there was a tremendous upsurge in patent activity. In 1946 the applications for patents filed totaled 92,000, which exceeded the number received in any year since 1930 and exceeded the number received in 1942, for example, by more than 40,000. In addition, applications for original registrations and for renewal of trade-marks totaled slightly over 26,000,—more than in any preceding year. Because of increased volume to be handled, combined with lack of sufficient technical personnel and other difficulties, the number of patents granted fell to about 27,000, the smallest number in forty years. It was then that our present large backlog developed. At the present time the backlog of patent applications awaiting action in the Patent Office is about 150,000. In recent weeks, fortunately, we have seen the first reductions in this burden in five years.

Administrative Changes Have Produced Greater Efficiencies

The administrative changes which have been made in the Patent Office to date are being reflected in greater efficiency of operations, and this will continue to be the case. However, it is clear that the answer to eliminating delays attending a patent application through the Patent Office today is not merely to increase the examining staff. Congress has recently recognized the increasing importance and requirements of this bureau and has increased its budget. With a projected organization of more than 2100 employees based on new appropriations, the Patent Office will be larger than ever before. Every effort has been made to insure that the technical qualifications of the staff are adequate to its responsible task. The job of classifying earlier patents and technical literature to facilitate the examination of pending cases is being tackled with a con-

siderably larger classification staff.

An area in which further effort may be quite fruitful in reducing expense and delay is that of procedures in soliciting patents. Any substantial revision of procedures requires a searching re-examination of the Rules of Practice to eliminate every unnecessary and impeding step. That work is again in progress after having been suspended for a time to develop rules under the new Trade-Mark Law. Your suggestions for improvement have been sought and will always be welcome. When a satisfactory draft of Rules is prepared, it will be submitted to the patent profession and to interested businessmen for comment and revision. This procedure was followed last spring with the trade-mark rules under the Trade-Mark Law.

We must recognize that revision of the Rules must be a continuous process and that a single overhauling will not dispose of the problem permanently. Such revision can only cut corners in the work and simplify our efforts. It cannot eliminate the basic amount of digging and hard work which must go into the processing of a patent application.

Inadequately Examined Patents Would Be a Disservice

One temptation we must avoid in this job is the temptation to meet the problem of backlog merely by forcing out a large issue of inadequately examined patents. We might make a great show of efficiency if we turned out three times as many patents next year as we did last. If those patents lacked merit, however, we would have done a great disservice to American business. We must be sure that the patents issued are worthy of the grant they carry. On our run to safe harbor we must avoid the red "nun" buoy on our right marking the sands of indeterminable delay and the black "can" buoy on our left marking the rocks of diminishing prestige of the patent grant in the eyes of business and the Courts.

In connection with all of these areas, I want to commend Bill Ooms for the great service he has done in improving the effectiveness of operations in the Patent Office during his term as Patent Commissioner. He has won the acclaim of people in Government, in business, and in the legal profession, because of the great work which, at immense sacrifice to himself and his health, he has contributed to the nation. He takes rank with the most outstanding of his predecessors in the high office which he has held.

Cooperation of the Bar Needed To Make System Work Best

Although much has already been done, we must still do more, I know, to increase the vitality of the patent system by improving procedures in the Patent Office. *You* can help, not only by your suggestions and cooperation in the development of simplified Rules of Practice, but also at times by dissuading certain clients from carrying on with applications for inventions which you in good conscience recognize as being so trifling or of so low an order as to be unworthy of the patent grant. This may seem an unrealistic recommendation but I believe it actually is in your own long term self-interest and that of your clients. You can also help by encouraging the highest standards of draftsmanship on all applications. This will require not only skill, but the courage to eliminate any unnecessary exposition and to resist the temptation to pile up claims merely because claims of great variety and almost indistinguishable differences can be drawn upon the invention. If accepted, these suggestions could aid substantially in reducing time of processing and would, as well, improve the quality of final product.

If in the next few years we can solve these problems we shall have made worthwhile progress. In all we do your cooperation is essential. Changes are bound to come in the patent system as in all other things as time goes on. Those changes should be guided and assisted by those most familiar with the operation of our patent structure. We can be certain of sound improvement only when that improvement results from the mutual efforts of all parties concerned.

Responsibility as to Technological Data and Patents Acquired During the War

Before closing I shall refer briefly to two other areas where the Department of Commerce has responsibility in connection with patents. In September of 1945, the Department of Commerce was chosen as the agency to disseminate to American industry the mass of scientific and technological information developed under government sponsorship during the war years—information which had been kept secret until after VJ-Day. The Department of Commerce has also become the agency assigned to gather for American industry the wealth of German technology which victory placed in our grasp. Our Office of Technical Services set up for these purposes has now finished the collection of scientific and technical information within Germany. We are now gathering what German materials are available in England, France, Holland and Norway. This work should be completed in the near future.

In addition to the screening and collection of enemy scientific and technical documents, the Department has been directed by the President to acquire international patent protection for those American industries which have been granted licenses under government-owned patents. Through the Office of Technical Services the Department is carrying out these instructions. Upon the recommendations of the industries concerned, patents have been taken out abroad which should prevent unfair foreign competition in the use of American research developments. At the present time a canvass is being made of all government departments to determine what war-time research deserves such international patent protection. On some of these discoveries international patents undoubtedly will be acquired.

We in the Department are conscious of our responsibility in han-

dling these matters—a responsibility on the one hand to protect American industries, and on the other not to hoard or interfere with the healthy development of new products and new applications of scientific knowledge in this country and throughout the world. We need the cooperation of business and the patent Bar in order to develop policies which will protect the public interest, benefit our own industries to maximum degree, and in no way endanger national security.

Solution of Patent Problems Must Preserve Vital Incentives

There are no easy answers to these problems. We must face them with the same tolerance for innovation that has marked our brief history as a nation. We have shown skill in mastering the difficulties of industrial organization that have attended our vast industrial growth. We appear to have some understanding of the technical problems in which we have been submerged by the expanding sciences. Surely the problems which the Patent Office weaves through all of these are within our mastery.

We in the Department of Commerce cannot and should not dictate the answers for you. We merely speak for American industry and commerce in the Government. We must look to you who have a special talent for the problems of industrial property to find the answers. Colonel Lawrence C. Kingsland, who succeeds Mr. Ooms as U. S. Patent Commissioner, brings to this office a great wealth of experience and broad accomplishment in private practice. He is well and favorably known to many of you. I know you will agree that he is eminently qualified to meet the problems he will face. But he, like all of us, will need your help. I feel sure he can count on it.

Any solution to these patent problems must insure the maintenance of vital incentives which the patent system was designed to nurture and has nurtured. The solution must also assure that the American people will have the greatest possible benefits of increased production and enriched variety of goods which our inventors make possible. Together we can and must make the patent system continue its services in the future, as it has in the past.

"Communist Party in the U. S. Seeks To Seize the Government"

■ In the classes for troop information and education in the United States Army in Germany, at which attendance is compulsory, the official lesson sheets in December are reported by the *Associated Press* to have told the troops that "Communism is spreading in many parts of the world, and it must be fought not by soldiers alone, but by all citizens".

Troop instructors were told: "Don't pull your punches," in teaching about Communism, "but don't stoop to name-calling, either."

"Communists now control the Governments of Poland, Bulgaria, Rumania, Hungary and Yugoslavia," the study bulletin said.

"In these countries opposition parties have been dissolved, opposition leaders exiled or killed, and the most elemental human rights curtailed or done away with. In Czechoslovakia, Italy and France, Communists exercise great influence and are working tirelessly to take over control.

"The Communist party in the U. S. has the same aims: to seize control of the existing Government by penetration and infiltration, or force if necessary, to set up a dictatorship.

"In our own country the Communists place their strength at 74,000—about one-twentieth of one per cent of the population.

"Yet that one-twentieth of one per cent has already made such inroads into many American institutions that we have been forced to take action.

"Without such action, that Communist minority one day might hold the same power in the U. S. that other Communist minorities hold in other countries."

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Annual Survey of Law—III:

Further Analysis of Trends of Judicial Decisions

by Roscoe Pound • University Professor Emeritus of the Harvard Law School

■ This installment of Roscoe Pound's monumental review of the *Annual Survey of American Law* carries it through such subjects of public law as the anti-trust laws, securities issues and exchanges, unfair trade practices, labor relations law, and wages and hours regulation; and then, in the domain of private law, such subjects as contracts, agency, sales, banking and negotiable instruments, suretyship, interpretation (in private law), subrogation, corporations, bankruptcy, corporate reorganization under the bankruptcy act, aviation law, telegraphs and telephones, insurance, equity, real and personal property, future interests, trusts and administration, succession and administration.

Many of his comments are pungent, as always; also, useful to the practitioner, as to decided cases. His appraisal of the *Survey* continues to be most favorable, but not unqualifiedly so. "One or two of the writers", he finds, let their Left Wing views "show through". In his seventy-eighth year, our beloved mentor is on the firing-line for freedom under law, in what may be the decisive battle for the world. He reports that his "work goes well". A recent letter from him bore postage stamps to the amount of $58 (Chinese).

[*Continued from our December issue, page 1191*]

■ In the chapter on the ANTI-TRUST LAWS a potential conflict between what the Supreme Court calls the "exclusive plenary authority" of the Interstate Commerce Commission to approve mergers and consolidations of carriers when in its judgment merger is necessary to provide adequate transportation service, regardless of possible conflict with the anti-trust laws, and efforts of the Anti-Trust Division of the Department of Justice to break up what it terms "the rate-making monopoly in the transportation field", affords an excellent illustration of the perennial problem of the law, how to maintain a balance between doctrines and principles of equal authority, neither of which can be carried to its full logical extent without giving up the other, and how to preserve as much of each as may be done consistently with the other. During 1944 the special phase of this problem had no more than indicated its existence. What is involved is well pointed out.

A case specially noteworthy is *United States* v. *Bausch & Lomb Optical Co.*,[32] (1) holding that a price-fixing scheme is not saved by the fact that some of the agreements underlying the combination in restraint of trade were legalized by an Act of Congress; (2) outlawing otherwise valid fair trade agreements of parts of a broader price-fixing conspiracy; and (3) granting the most drastic relief to the Government in order to insure complete elimination of the price-fixing monopoly. The Government was granted extremely broad visitatorial powers; representatives of the Department of Justice were to have access to all records and documents "relating to any of the matters contained in the judgment . . . subject to any legally recognized privilege". Respondent and its officials were enjoined from refusing to discuss with representatives of the Department any matter relating to the subject-matter of the judgment or to bar them from their property even if they were to appear unprovided with search warrants. We are told that doubts were to be resolved in favor of the Government. Here is something that could have been used effectively in connection with injunctions against conspiracies to evade the National Prohibition Law. If such powers can be given by the Court to executive officials, why not by Congress to administrative officials? It might be felt that this decree sees the Anti-Trust law out of proportion, and freedom of trade in

32. 321 U. S. 707 (1944).

optical instruments as of such transcendent importance that all other considerations must give way. According to the Supreme Court, its power extends to such drastic measures as will achieve freedom from the influence of an unlawful restraint of trade.

At the end of 1944 there was still much uncertainty about application of the anti-trust laws to combinations between labor unions and an employer or employers where the purpose of the concerted action might come within the broad definition of "normal labor objectives" but the participation of a non-labor group resulted in a general commercial restraint of trade. The Supreme Court in 1940 had cast doubt upon decisions of the Court in 1926. In 1944, decisions in the Circuit Courts of Appeals differed, and the subject was still in confusion. The outcome will demand attention in a later volume.

Unsettled Questions as to Security Issues and Exchanges

Under the heading SECURITY ISSUES AND EXCHANGES the decisions reviewed were mostly in the lower federal Courts, where a number of important questions were decided which remained unsettled by the Supreme Court during the year. The most important case is *Baird* v. *Franklin*,[33] in which the Supreme Court denied certiorari. With knowledge of the gross misconduct of one of its members on the part of its responsible officials, the New York Stock Exchange for more than three months permitted the member to continue in business as such without disciplinary action. The owners of converted securities sued the Exchange as being persons injured by violation of § 6 (b) of the Securities and Exchange Act who could recover for their losses due to failure of the New York Stock Exchange to carry out its duty under the Act, or, in the alternative, as third-party beneficiaries of the agreement filed by the Exchange with the Commission under § 6 (a) (1) of the Act whereby the Exchange undertook to enforce so far as possible compliance with the Act by its members. The Court went on the common law proposition that the members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach, and that the common law will supply a remedy if the statute does not. The action would be for the difference between what the plaintiffs would have received if the Exchange had done its duty and what they actually did or would receive.

Thus the Courts are competent to make our newer legislation effective by turning to the common law—something which legislators, undertaking to prescribe remedies in great detail, sometimes forget. But a judgment for the defendants was affirmed on the ground that the plaintiffs had failed to prove that damage to them resulted from failure of the Exchange to act after it had notice, there being no evidence to show that, if the Exchange had acted at once upon notice, the loss to plaintiffs would have been obviated.

Mr. Lane, who writes this chapter, expresses surprise at the result, considering that after failure to act on notice was shown, the Exchange should have been required to go forward with proof that there was no injury. This is a typically administrative view. That a plaintiff suing in tort should not have the burden of proving a most material part of his case, but may expect the defendant to prove he has none, is asking too much for any Anglo-American Court to accept.

Benevolent Concern for Investors Is Questioned

In *Goldstein* v. *Groesbeck*[34] the Court again held that where the statute did not expressly give an action, yet there was an action for injury through violating the terms of an Act meant to protect the public. Mr. Lane praises this following of a long-established common law doctrine as showing "an attitude of broad sympathy for the rights of investors." The Court is also praised properly for holding in *Oppenheim* v. *Young*[35] that in a class action under Rule 23 (a)(3) of the Federal Rules of Civil Procedure, a claim recognized by established equity doctrine may be established although the amount of damages claimed by the several members of the class would not necessarily coincide. This is said to show a solicitude of the Court for investors. I should say that it shows a solicitude to make the new Federal Rules effective for their purpose of maintaining the substantive rights of the parties, no matter who they are. Sympathy for the poor investor as a *ratio decidendi* takes us back to the Chancellors of Henry V, who were moved to grant extraordinary relief to complainants who had fought for the King in his wars in France or had long been in the service of the King's sister-in-law. Such reasoning belongs to the benevolent King administering justice in person rather than to Courts.

Under the heading of UNFAIR TRADE PRACTICES, the most interesting question arose as between the Federal Trade Commission and the Food and Drug Administration. Two statutes regulate claims made by manufacturers for the same products. On the one hand, there were libel proceedings under the Food and Drug Act for misbranding. On the other hand, there were proceedings on the same facts by the Federal Trade Commission for false advertising. The lower federal Courts differed on this situation in three cases. If under the statutes the Courts are powerless, one can only recommend Mr. Dooley's suggestion of gentlemanly restraint. Administrative zeal, usually of subordinates, has led to obstinate adherence by each agency to its own view. Concurrent jurisdiction of administrative agencies is even worse than concurrent jurisdiction of judges because the latter is subject to the check of review by a bench of judges.

Labor Law from an Attitude of Antagonism to the Courts

In the chapter on LABOR LAW a great mass of decisions of lower federal Courts as to the National Labor

33. 141 F. (2d) 238 (1944).
34. 142 F. (2d) 422 (C.C.A. 2d, 1944).
35. 141 F. (2d) 387 (1944).

Relations Board are carefully stated and reviewed. We are told that the Board was "freed almost entirely from interference by the Courts". Perhaps if it had not been so free and had been held by the Courts to some degree of fairness, it might have fared better recently at the hands of Congress. In line with this pronouncement, the chapter in the 1944 *Survey* is written in an attitude of antagonism to the Courts. There is a full bibliography of the discussions in the legal periodicals. The State union-control Acts (with one exception, the Texas statute, as to which the case was decided on a very narrow issue, so that the writer of the chapter admits that the net result was not made clear) had not during 1944 been passed on by the Supreme Court, where alone final results could be had. They must be left to later volumes. So, too, the "closed shop" legislation of 1943 and 1944.

As to wages and hours, it is noted that fully half of the decisions on that law do not find their way into the official reports. They are published unofficially as they appear in the *Wage and Hour Reporter*.[36] Of the most interest under this head is the discussion of the general principles of interpreting the Fair Labor Standards Act and the Regulations. It brings out clearly the confusion of application with interpretation spoken of above and the results of that confusion in spurious interpretation. But the Administrator has been frank in publishing interpretative bulletins setting forth the principles he purposes to pursue in carrying out his duties of enforcement. The extreme extensive interpretation of "commerce" and of "production" in this connection have been spoken of heretofore. The Supreme Court had suggested as a test "a practical judgment" as to whether the work was required as part of an integrated effort for production of goods. The lower federal Courts have made of this a "payroll test". On the other hand, the exceptions or exemptions in the Act have been construed with a strictness which approaches in restrictive interpretation the extreme of the extensive interpretation of the body of the act. Granting that remedial statutes are to be liberally construed and the exceptions to them strictly construed, the words "liberal" and "strict" are not a license for unbridled spurious interpretation. Administrative zeal to bring everything in way of employment anywhere under its control in this way stands out in the ten pages of details of cases denying claims of exception or exemption from the Act.

Survey of Decisions and Trends in Domain of Private Law

PUBLIC LAW, which takes up two of the five parts of the *Survey*, has called for most attention because of the many and often far-reaching changes which were brought forth by the war. When we turn to *Part III—Private Law*, there is much less to note. Under CONTRACTS, we learn that New York by statute substituted the "formality of a writing" for consideration. Would it not be more true to say "for the formality of consideration"? In four cases during the year the doctrine that acceptance of a check for less than the amount of a liquidated debt now due, stated on its face to be in full payment, will not preclude recovery of the balance, was substantially abrogated or much restricted. Also another State was added to those which enforce a gratuitous undertaking by way of mandate with no *res*. The passing of consideration goes forward rapidly. Little was decided on AGENCY. But in a doubtful decision (four to three),[37] what purported to be the act of the principal himself but was forged, was held binding as within the apparent authority of the agent.

In SALES, BANKING AND NEGOTIABLE INSTRUMENTS, and SURETYSHIP there was little significant decided and few articles of general interest were published. Under INTERPRETATION (IN PRIVATE LAW), however, there is one significant case. One who sells material to the principal contractor was held not a "subcontractor" so as to create liability (under a statute) to one who sells material to a material man, who sells to a contractor. This follows the established use of the term "subcontractor" in the building trades. But compare this with what the same Court (the Supreme Court of the United States) said the same year in the portal-to-portal case as to the irrelevance of prior practice and settled usage in the particular employment.

In two cases on SUBROGATION, a surety's right to subrogation to the fund retained as security for final completion of a building contract was held superior to liens of the United States for unpaid taxes, due from the principal contractor. The Government had only a lien on the property and rights of the taxpayer, and his rights to the fund were inferior to those of the surety, who succeeded by subrogation to the superior rights of the creditor. Moreover, the surety's rights were fixed on execution of the bond which was prior to the taxation. It is noteworthy that the Courts are not extending, but rather restricting, the prerogatives of government as to priorities and preferences, despite claims that public law is superseding private law, while administrative rulings and Courts which take the administrative view of law have been going to the limit of extensive interpretation in favor of the Government.

As to the law of CORPORATIONS, a New York statute of 1944 as to stockholders' derivative suits adopts the rule of the federal Courts which the Court of Appeals had rejected a generation ago. As I had argued, forty-odd years back, that the federal rule was based on general equitable principles and not on convenience of the Courts, I can only be well satisfied by this retracing of its step by the most influential of the jurisdictions which rejected the doctrine of the federal Courts. The one outstanding decision[38] is said to be the first

36. Published by the Bureau of National Affairs, Inc.

37. *Thompson* v. *New York Trust Co.*, 293 N. Y. 58.

38. *Blaustein* v. *Pan American Petroleum & Transport Co.*, 293 N. Y. 281 (1944).

involving claimed liability of a majority stockholder to a partly-owned subsidiary for diverting to itself corporate opportunities of the subsidiary. The Court of Appeals (four to two) denied recovery on the facts, there being no proof that at the time properties were acquired they were recognized or identified as properties in which the corporation on behalf of which suit was brought had a tangible expectancy.

Bankruptcy and Corporate Reorganizations

Under the heading of BANKRUPTCY, most of the cases involved reaffirming generally accepted principles applied to particular situations of fact. A few dealt with novel or interesting problems requiring interpretation of provisions added or amended by the Chandler Act or indicated definite tendencies in the evolution of the ordinary law. Mr. Seligson takes these up in thirty pages of clear exposition and well-reasoned critical discussion. He notes that the trustee has the extraordinary privilege of two separate trials on an identical issue of controverted fact. This goes back to something it had been thought was outgrown in the recent development of procedure. Two decisions as to "willful and malicious injuries to person or property of another", specifically exempted from the operation of a discharge, deserve notice. In each case the liability was for bite of a known vicious dog. In each case the gist of the action was held not to be negligence in not keeping the dog secure, but in maintaining a kind of nuisance by harboring a vicious dog, thus raising an old question as to the basis of tort liability for injuries by animals. Harboring a known vicious dog without just cause or excuse was held to be a malicious act done intentionally.

Under CORPORATE REORGANIZATIONS UNDER THE BANKRUPTCY ACT, we are reminded that 1944 saw the end of reorganization by equity receivership. Also the writer notes the ignoring by the Supreme Court of the applicability of the Federal Rules of Civil Procedure in cases decided by the Court as to consent to summary proceeding in the bankruptcy Court by a claimant of property not in the possession of the bankrupt when the petition is filed. In dealing with the claims of creditors the bankruptcy Courts sit as Courts of equity and both in reorganization and in bankruptcy proceedings may subordinate fraudulently or unfairly obtained claims so as to adjust the equities among creditors in relation to the ultimate sharing of the assets. Interesting cases involving exercise of this power are discussed. It is noteworthy that a Circuit Court of Appeals properly refused to sanction use of the power of subordination as a punishment. Equity powers are to be used for remedy, not for punishment.

On AVIATION LAW there is a useful note of the literature in 1944. Under TELEGRAPHS AND TELEPHONES there are some interesting State cases on the use of telephones for gambling on races. In Pennsylvania a corporation which published a paper on racing news, with no subscribers but sales at newsstands, was refused telephone and teletypewriter service to the race courses, and its complaint to the Public Utilities Commission was dismissed. The Supreme Court sustained the complaint, saying that while betting on horse races was unlawful in Pennsylvania, horse racing was not and gambling was not a necessary concomitant of horse racing. The racing publication conveying information useful to gamblers was not a "device or apparatus for gambling".[39] In Massachusetts, it was held that a ticker-tape machine served to disclose that a better had won or lost, but not to determine whether he should win or lose, and so was not subject to forfeiture.

These cases are of interest on the question of how much an Appellate Court may be supposed to know. They remind one of the English judge who, hearing a witness testify that he called a policeman by shouting "Bobby," inquired, "So you were acquainted with the policeman? How did you know his first name was Robert?" On the other hand, in New Jersey it was held that if a telephone company had reasonable cause for believing its facilities were being used in furtherance of an unlawful purpose it might remove its equipment; and in Arkansas it was held that a teletype machine could be a gambling device liable to seizure as such where used primarily to furnish racing information to gambling houses.

Under the heading INSURANCE three cases of murder of the insured by the beneficiary of a policy are discussed. The incontestability clause could not be invoked by the murderer-beneficiary. But denial of recovery to the beneficiary does not relieve the insurer from payment. It must pay the estate, or in one case was adjudged to pay the widow and minor child of the deceased. Recovery is denied to the beneficiary only where there was no justification for the killing. Interesting questions of automobile insurance are reviewed where husband or wife being insured, the other is injured through the negligence of the insured. In one case this situation was complicated by the community property regime which obtained in the State.

A Notable Article on Equity in the 1944 Survey

There is a notable article on EQUITY by Professor William F. Walsh. At the outset he tells us that the tendency to expand specific relief at the expense of the older substitutional relief by way of damages is apparent, but that cases are still numerous in which ignorance of legal history and of the character and effects of the merger of law and equity in procedure are unhappily manifest. Accordingly, he urges greater concentration on essentials in legal education instead of diffusion in the attempt to cover "the many forms of so-called law which are developing in governmental control". He takes the subject up under nine heads: (1) Jurisdiction and code merger, (2) injunctions in tort cases, (3) specific performance, (4) judicial discretion in equity, (5) equitable restrictions,

(Continued on page 85)

39. *Pennsylvania Publications, Inc. v. Pennsylvania Public Utility Commisson*, 349 Pa. 184 (1944).

"Books for Lawyers"

DECENTRALIZE FOR LIBERTY. *By Thomas Hewes. New York: E. P. Dutton & Co. September, 1947. $3.00. Pages 238.*

The problem underlying all problems today is the relationship between the individual human being and the state.

In his special message to the Congress after the bombardment of Fort Sumter, Lincoln said: "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" Prophetically he added: "This issue embraces more than the fate of the United States." Today the totalitarian state, buttressed by Communism, challenges democratic government throughout the world.

Lawyers, as they think and plan and work, continually encounter this dilemma. They are uncertain how far our federal government *must* be strengthened and how far it is *safe* to go in centralizing more and more power. In their quandary, they will find illumination and practical help from *Decentralize for Liberty*, which the scientist Lecomte DuNouy, author of *Human Destiny*, terms "a work of the utmost importance".

Thomas Hewes has worked in government at all levels, so that he knows whereof he speaks. On the federal level he has been Assistant Secretary of the Treasury for Fiscal Affairs, Special Assistant to the Secretary of State, and member of the Advisory Commission of the Council of National Defense. On the State level, he was elected to the Connecticut Legislature, served on the Commission to Revise the General Statutes of that State, and was chairman of its Commission to Reorganize State Departments. On the local level, he was chairman of the local board of finance at Farmington, Connecticut, and member of its school board. Finally, he has been a practicing lawyer all his life and a member of our Association since 1921.

I first met him when, after the publication of *Justice and the Poor* in 1911, he got the Connecticut State Bar Association to appoint a special Committee on Legal Aid. As its chairman he persuaded the Legislature to enact three pioneer statutes: The first created public defenders in every county; the second established small claims Courts throughout the State; the third authorized cities to set up municipal legal aid bureaus, which has been done in Bridgeport, Hartford and New Haven.

His fear of over-centralizing government is engendered, not so much because of political appointees and bureaucratic red tape, but rather because he clearly sees BIGNESS as an evil in and of itself.

There exists no scientific dissection of the phenomenon of oversize or giantism; but we all sense the danger, and red signals are given from time to time by those on the alert. Thus, Professor Dewing in his exhaustive study of American corporations reports that many mergers took place, not to achieve large-scale economies (which were non-existent), but to satisfy the egotism of some captains of industry. Pointing out the more fundamental trouble, Judge Learned Hand has written:

> As the social group grows too large for mutual contact and appraisal, life quickly begins to lose its flavor and its significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which make, and which indeed alone create, an individual.

Tom Hewes' argument likewise is based on qualitative considerations. The core of his thesis is:

> Decentralization is not an end in itself, it is a mere physical thing. The end products are free people, self-reliant and independent men and women in quantity, strong communities and regions, a more flexible and more powerful nation, a defense in depth in peace and in war. (page 33)

Toynbee, in his classic *Study of History*, which all lawyers should read and ponder, appraises all civilizations and concludes that the virtue of democracy lies in its concordance with the evolution of man as a moral being. Democracy makes mistakes, but they are due to our own errors and from them we can learn. In similar vein Tom Hewes asserts:

> Our own government, as far as possible, must be returned to the neighborhoods, the towns and states of the nation so that each citizen and each family may share in, and understand, the responsibilities and advantages of active democracy. (page 33)

His plan is not "back to the soil" but it is down to earth. *Every citizen lives somewhere.* Where a man's home is, there his heart is. Local government is something he can understand and take part in. Thus he can become the good citizen contemplated by Plato and Socrates.

Mr. Hewes realizes full well that no town, or even a metropolis, can exist in isolation. Politically and economically they are parts of a great nation. There are definite national needs that can be met only by national action.

But the question of balance remains. The interstate commerce clause when redefined as "anything that affects the flow of interstate commerce" can be so construed as to embrace all activities and lead straight to the monolithic state. The uneasy condition of the world adds a seductive glamor to all centripetal forces. To challenge this steady drift, Ben W. Palmer last year wrote

for this JOURNAL his deeply philosophic article, "Liberty and Order: Conflict and Reconciliation" (32 A.B.A.J. 731; November, 1946).

While Mr. Hewes' long experience makes him dread further aggrandizement of federal power, he believes that our real enemies are not "the vested interests" or "the proletariat", but instead are ideas which we have unquestioningly accepted and which are false. A revolution in ideas is accomplished by education, not by bloodshed. The remedy is in our own hands, because the source of all energy is the individual.

Part II of the book is a concrete plan for action—a plan which, in the author's experienced judgment, will lead to maximum productivity and greater economic independence for the individual, and will limit governmental controls and aid to specific categories. Such a program is based on the democratic concept of liberty under law. In Mr. Hewes' words (page 69):

> The unhampered individual efforts of the largest possible number of people are essential to insure our economic salvation as a whole, as well as to provide the opportunity for personal material security and development. Therefore, maintenance of individual liberty under the law must be the first and unvarying object of our will.

The Epilogue concludes with these moving sentences (page 197):

> Did we create the liberties of America? No. They are handed to our care in the beautiful language of our Constitutions and by the valor of our forebears.
>
> Let us then with fidelity and zeal reclaim our heritage—our lands and our liberties; restore the individual American to dignity and power and, passing, yield our guardianship, enriched, to our children.

REGINALD HEBER SMITH
Boston, Massachusetts

TWO CAME TO TOWN. *By Simeon Strunsky. New York: E. P. Dutton & Co., Inc. 1947. $3.00. Pages 219.*

The two who came to town were Mr. Thomas and Mr. Alexander. Mr. Thomas was a very tall man (I am inclined to think his hair was red); Mr. Alexander was a little below medium height and some dozen years younger than Mr. Thomas. The two were delegates from their native Hyperia to "a conference".

The long arm of coincidence delivered the visitors to the tender care of Marcus, a taximan, and Selden, a newspaper man, who proceeded to do the guiding, to participate in the philosophizing, and to share the friendship. This is the story not so much of the adventures of the four as of what they thought and said as they went about town.

Although that idea seems never to occur to either Marcus or to Selden, there was something a little odd about both the native land of the strangers and themselves. In area, population and development Hyperia seems to correspond roughly with this country as it was in the last decade of the Eighteenth and the first of the Nineteenth Century. Curiously enough, both Mr. Thomas and Mr. Alexander are thoroughly familiar with our history during and prior to that period, though vague as to what has happened since. Indeed, Mr. Thomas wins a bet from Marcus by proving that in the Declaration of Independence is written "a decent respect *to* the opinions of mankind", and not "a decent respect *for*". Both Mr. Thomas and Mr. Alexander use the present tense when they express their admiration for Mr. Madison and discuss General Washington's liking for light amusements—almost as if those worthies were still alive.

Not only in personal appearance but in characteristics and in opinions the two Hyperians are dissimilar. Mr. Thomas is delighted with the gadgets that clutter the American scene and invariably speculates upon a method of improvement; he is ill at ease in crowds and finds difficulty in expressing himself to large groups; he dislikes large cities and believes that the safety of a nation can best be entrusted to small farmers; he declares that the least government is the best.

Mr. Alexander is not greatly impressed by mechanical contrivances; he does respond to the stimulus of crowds and readily reacts to the charm of American women; he believes in big business and in a strongly centralized government.

Perhaps Mr. Thomas and Mr. Alexander are merely resuming a debate in which from time to time they had engaged in Hyperia. They seem to conclude, however, that although over here we have not completely followed the pattern that either of them had made for Hyperia, we have not entirely muffed our chance. Perhaps there is some symbolism—of course unintended—in the fact that although, because of the mischances of subway travel, they never visit the Statue of Liberty, they do obtain a clear view of it from the Staten Island ferry.

If, like me, you have often wondered what a visitor from Hyperia would think of us, here you may learn.

The author is that erudite, whimsical and meditative columnist whose "Topics of the Times" daily enlivens the editorial page of that newspaper which purveys "all the news that is fit to print". For once he has stepped aside and has become merely a veracious chronicler.

WALTER P. ARMSTRONG
Memphis, Tennessee

FOUNDATIONS OF MODERN WORLD SOCIETY. *(Revised Edition). By Linden A. Mander. Palo Alto, California: Stanford University Press. 1947. $5.00. Pages xiv, 928.*

This revision of a book published six years ago, although only slightly larger than its first edition, contains so much new material on the subject of world organization that it should be noted here. It puts more emphasis than its first edition did on the problems of peace and security and assigns a more fitting place to international law. But the author, Professor of Political Science at the University of Washington, still devotes the bulk of his work, about two-thirds of it, to international cooperation in fields other than politi-

cal. He devotes detailed chapters to problems of health, labor, prevention of crime and communications. Besides chapters on international trade and finance, there are special chapters on population problems, conservation of resources, minorities and dependent peoples. He deals also with intellectual and religious organization and with international regional organizations.

Although designed as a college textbook, the volume is a welcome departure from the dry and musty language of average textbooks. Thanks to its vigorous style and dramatic presentation, it will appeal to the college student and to the general reader as well. Lawyers may be interested in the short sketch of the history of international law, in the analysis of the binding character of international law and of the causes of that law's present weakness. The author ends on a grim "One World or None" note, and suggests various ways of obtaining the world unity which is necessary to avert atomic doom.

Like other books of this type, the volume under review cannot cover the vast field of international relations in a way that would satisfy those who have, or wish to acquire, special knowledge of any particular aspect of the subject. The author has attempted to give a rounded picture of the whole, and was in consequence obliged to concentrate on high points or spectacular failures of each organization. But he was able in each case to catch the spirit of the various organizations described by him and to pick out things of general and permanent value. A few inaccuracies—like the statement on page 354 that only two complaints with respect to non-observance of international conventions were lodged by workers' unions before the Governing Body of the International Labor Office—may jar the expert, but the general reader will still obtain a more accurate and up-to-date picture than is presented in other books.

LOUIS B. SOHN

Cambridge, Massachusetts

WILL DOLLARS SAVE THE WORLD? *By Henry Hazlitt. New York: D. Appleton-Century Co. Irvington-on-Hudson, New York: Foundation for Economic Education, Inc. November, 1947. 75c paper-bound (from the Foundation). $1.50 cloth-bound (from Appleton-Century). Pages 95.*

The ablest argument in answer to the prevalent contention "that the United States has a duty to lend or give huge sums to other countries, principally in Europe, if it is to save the world from Communism and chaos" was published in November, from the pen of the gifted Henry Hazlitt, formerly the editorial writer for the New York *Times* on financial and economic subjects, now the writer of the "Business Tides" column for *Newsweek*, recent author of *Economics in One Lesson*, which became a best-seller in America and England and is now being issued in French and Spanish translations.

The declared position of our Association through its Committee on the subject and the House of Delegates (33 A.B.A.J. 1090, at 1164; November, 1947) may not be regarded as in accord with Mr. Hazlitt's well-buttressed conclusions from his first-hand observations abroad this year. His conclusion is that the distressing and menacing conditions in European countries have been caused, not by the destructions and dislocations due to the war, but to the collectivist policies of the government whose peoples are now in despair. Facing nevertheless the future rather than recriminations as to the policies which brought England and Europe to extremity, he offers a constructive program which he believes would work whereas huge loans would work against our avowed purpose abroad and plunge our own economy into a plight like that of Britain and the Continent. He advises that our capitalistic free enterprise system should be freed of "planned economy" controls, made strong, and encouraged to defeat inflation by increased work and production; that unsound policies of the Internal Bank and Monetary Fund should be checked and reversed, in the direction of currency stabilization on a gold standard; and that the ideological and diplomatic challenges of the Soviet Union, its satellites, and its proselyting agents in America, should be accepted by a bold defense of capitalism and an informed attack on the Communist economy which has to be bolstered by the "slave labor" of more than 4,000,000 prisoners of war and political exiles. Here is a brilliant defense of the American free economy, along lines that may be dubbed "old-fashioned". No one who fails to obtain and read this book can justly regard himself as fully informed on the factual issues of the great debate which will take place in the Congress and among the people during the next few months. W. L. R.

JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932. *New York: Central Book Company. 1947. $1.50. Pages 58.*

Although it is known to many, the story of the correspondence between Justice Holmes and Doctor Wu will bear repeating. In 1921, Holmes received a letter from a young Chinese, then a student at the University of Michigan Law School, calling attention to an article by the writer, John C. H. Wu, in the *Michigan Law Review*.[1] Before he had seen the article, and under the impression that his correspondent was an immature student, Holmes wrote a perfunctory reply. When the Justice read the article he realized that he was "addressing a scholar" and immedi-

1. "Readings from Ancient Chinese Codes and Other Sources of Chinese Law and Legal Ideas", 19 *Mich. Law Review* 502. Justice Cardozo refers to "an interesting article by Dr. John C. H. Wu on the 'Juristic Philosophy of Mr. Justice Holmes's . . . 'The prophecies of what the Courts will do in fact, and nothing more pretentious,' says Holmes, 'are what I mean by the law.' Dr. Wu develops with acuteness the implications of the statement." *Growth of the Law* (pages 204-205) in *Selected Writings of Benjamin Nathan Cardozo*, edited by Margaret E. Hall, Fallon Publications, New York (1947). Cf. 21 *Mich. Law Review* 523.

The letters from Dr. Wu to Holmes have never been published. However, as a result of the friendly offices of Dr. Lin Yutang, the Central Book Company and Dr. Wu have agreed that this will now be done.

ately sent a letter of apology. Thus began a correspondence which continued for more than a decade (1921-1932).

During this time Dr. Wu visited Holmes in Washington once and attended Harvard on a fellowship. Since then Dr. Wu has been Dean of the Comparative Law School of China, President of the Shanghai Provisional Court, and Adviser to the Chinese Delegation at San Francisco. He is at present his country's Minister to the Vatican. No doubt Dr. Wu's absence from China is regretted by one of his old American friends now there, for Dean Pound was one of those to whom Holmes wrote on behalf of his young Chinese friend when Wu went to Cambridge in 1926.

These letters of Holmes' were first published in full in the October 1935 issue of the *T'ien Hsia Monthly*. They were also included in Shriver's *Holmes: His Book Notices and Uncollected Letters and Papers*.[2] Excerpts from them appeared in the *Saturday Evening Post* after Holmes' death, and a number of them are in Lerner's *Mind and Faith of Justice Holmes*.[3] Francis Biddle in his biography of Holmes[4] relied heavily upon them. The Shriver book is out of print, and the complete text of the letters is now available only in this little brochure. Beautifully printed on fine paper, its attractiveness is enhanced by an excellent reproduction of William Meyerowitz's etching of Holmes.

Reluctantly accepting the view that prior publication forbids quotation, the temptation to comment is irresistible. These letters of Holmes' are the most revealing of his writings that have yet come to light —much more so than the letters to Sir Frederick Pollock.[5] In writing to Pollock, Holmes sometimes seemed conscious that posterity was peeping over his shoulder; but his attitude toward Wu was paternalistic and, perhaps stimulated by the young man's eager admiration, he wrote with a lack of restraint that was not habitual. As a result the letters contain much of Holmes' philosophy of life, of his attitude toward his work, of his feeling toward his fellow Justices, of his theory of style and his constant criticisms of books read. Indeed, it is not too much to say that here, without the patina of biography or comment, is the essence of Holmes, the man.

WALTER P. ARMSTRONG
Memphis, Tennessee

CASES AND OTHER MATERIALS ON THE LAW OF DECEDENTS' ESTATES. *By Max Rheinstein. Indianapolis: The Bobbs-Merrill Company. 1947. $8.50. Pages xiii, 1295.*

Competent workmanship in the fields of intestacy, wills, probate and administration has been put into this assembly, by the learned Max Pam Professor of Comparative Law at the University of Chicago, lately of American Military Government in Germany.

In an area of law where there is no dearth of good case books, unorthodoxy had to be the reason for a new one.

In a Preface plainly labelled as "meant to be read by students (and by professors too)", Professor Rheinstein avers that only parts of the book are meant to be "studied", that "others are included only for reading", and that "others may well be skipped by the general reader". He treats the law of decedents' estates as "full of political and human problems", and gives fascinating instances. "Will cases are dramatic. Try to feel the excitement." His discussion of "The Social Function of the Law of Inheritance" is philosophical, hardly orthodox in American thinking: "We may wonder why a man shall have the power of disposing of his property beyond his grave. This world belongs to the living. Why should it be ruled by the dead? . . . Freedom of testation has rather been the exception in history than the rule."

Recognizing that lawyers will nevertheless go on drawing wills and Courts will go on trying to find and carry out the intent of testators, Professor Rheinstein makes a plea, and a good case, for craftsmanship, skill, and infinite pains. He points this particularly by bringing from the archives Professor Albert Martin Kales' delightful essay of forty years ago on "The Will of an English Gentleman of Moderate Means" (19 *Green Bag* 214). For a case book, this tome contains a lot of useful and agreeable reading. W. L. R.

THOMAS JEFFERSON—AMERICAN TOURIST. *By Edward Dumbauld. Norman, Oklahoma: University of Oklahoma Press. 1947. $3.00. Pages xv, 266.*

This book does not deal with Jefferson the lawyer, but its author is a lawyer (Special Assistant to the Attorney General of the United States); and lawyers will find it diverting, interesting and instructive. It is an account of Jefferson's travels in this country, England, Italy, the Low Countries and Germany. Because it is a book of journeys and comments, its point of view shifts rapidly and frequently; it has no thesis for logical development. It represents a vast amount of reading and research, and the material is attractively assembled. It is a good traveling companion or bedside book. It will readily and profitably occupy spare time.

Mr. Dumbauld has given us more of the convincing evidence that the founders of this country were men of education, culture, refinement and broad historical insight and perspective. Jefferson's comments on history, art, language, agriculture and commerce are astounding. The book reveals also a lofty and single-minded devotion to the institutions and welfare of our country that should be an inspiration for this era which is self-centered when it is not divided in loyalties. Wherever Jefferson

2. Edited by Harry C. Shriver. Central Book Company, New York, (1936).
3. By Max Lerner. Little, Brown & Company, Boston, (1945).
4. *Mr. Justice Holmes*. Charles Scribner's Sons, New York, (1942).
5. *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, edited by Mark DeWolfe Howe. Harvard University Press, Cambridge, (1942). On August 2, 1923, Holmes wrote Pollock: "I have told you, I think, of a young Chinaman who writes to me from Berlin", etc. Volume II, page 120.

went, he searched for methods which might increase production and trade or improve living conditions at home. He kept his feet firmly on foundation-stones of reality and experience.

In this heyday of emphasis on industrialism and mass-democracy, when the classics are neglected, arts of expression are given slight attention, and the experiences of the centuries go unheeded amid the reliance on improvisation and innovation, it is advisable for us to turn back occasionally and renew our acquaintance with the principles, ideals, cultural interests and standards of life of the author of the Declaration of Independence.

A REPORT ON GERMANY. *By Lewis H. Brown. New York: Farrar, Straus and Company. November, 1947. $3.00. Pages xiii, 247.*

In the noteworthy series of books which Farrar, Straus and Company is publishing as to world affairs, this volume by the Chairman of the Board of Johns-Manville Corporation is the kind of a factual report which one would expect from an experienced and straight-thinking industrialist. Mr. Brown spent two months in Western Germany at the request of General Lucius D. Clay, Commander-in-Chief of the European Command of the U. S. Army Forces, who wanted to find out what really should be done, if political and diplomatic considerations could be subordinated, to get German industry back into production and off the backs of American taxpayers. This is the tough-minded report to General Clay.

Its premise is that the economy of America and the avoidance of intolerable regimentation, even depression, here depend on a speedy rehabilitation of Germany and its restoration as a market for American goods and a producer of goods for the world market. Increased coal production in Germany and England, with Germany using its own coal for its own industries, is to him the key. He would even introduce the "incentive" system, with rewards in clothing, food and "gadgets", to spur production. There is no meandering or "double-talk" in Brown's specific program. A board of directors would understand it and adopt it, with confidence that it would work. Politically-minded men of little or no practical experience will probably do nothing about it.

W. L. R.

THE LA FOLLETTES AND THE WISCONSIN IDEA. *By Edward N. Doan. New York: Rinehart and Co. November 28, 1947. $4.00. Pages 311.*

A militant newspaperman of Progressive Republican faith and affiliations has written an earnest portrayal of Robert Marion La Follette, who started his career as district attorney of Door County, Wisconsin, at $800 a year salary plus $50 for expenses, which he embraced as a "golden opportunity". This lawyer went on to be the "youngest member elected to Congress", Governor of Wisconsin, United States Senator, third-party candidate for the presidency, and fighting leader of a crusade which dominated Wisconsin politics and led men and women to follow him enthusiastically or hate him intensely.

Although the book is devoted mostly to "Old Bob" and the impacts of his dynamic ideas, its chronicle is really of a "father-and-son team". "Young Bob" was "the youngest Senator since Henry Clay", his father's superior in the art of legislation. A lesser role is given by Doan to Philip, the other son, onetime Governor of Wisconsin. Of the forty-odd years of the La Follette dynasty, Doan has written an absorbing chronicle. "Old Bob" seems never to have forgotten that he was a lawyer; he drafted his radical legislation so that it "stuck". "Young Bob" had far greater gifts of friendliness and flexibility and of working along in the give-and-take of legislative accomplishment. "Old Bob" rose to power on a rising tide of radicalism which he abetted; "Young Bob" had to cope with a groundswell of enmity and reaction against his father's violent extremes of view. So he paid the penalty of party irregularity too prolonged; to many who disagreed emphatically with his father and with him, his retirement from the Senate was a public loss. "Conservatives" in America traditionally recognize, with a good-natured tolerance, the worth and usefulness, in a legislative body or even a Court, of a sincere, capable and congenial "leader of the Left", like "Young Bob"; "radicals" like "Old Bob" have traditionally made, and still make, unceasing and unscrupulous war on any who do not follow their "line". "Those who raise the sword perish by the sword." This was the foretold fate of the La Follette dynasty.

W. L. R.

LETTER FROM GROSVENOR SQUARE. AN ACCOUNT OF A STEWARDSHIP. *By John G. Winant. Boston: Houghton, Mifflin and Co. November 18, 1947. $3.00. Pages 278.*

This is a sincere and warming chronicle of the experience of our Ambassador in London during the year before Pearl Harbor. As "a study of the enduring friendship of men and of nations", notably of England and America and their leaders, it contains much that is interesting and valuable for its sidelights on the events of that stirring year. Published at the time of the tragic death of the militant former Governor of New Hampshire, it is his testament to his countrymen. The many who disagreed strongly with his views and objectives will respect the earnestness and simplicity of his narrative.

CRIMINAL PROCEDURE FROM ARREST TO APPEAL. *By Lester B. Orfield. New York: New York University Press. 1947. $5.50. Pages xxi, 614.*

In the Judicial Administration Series published under the auspices of the National Conference of Judicial Councils, headed by Chief Justice James P. Alexander of the Supreme Court of Texas, a significant and useful work has been written by Pro-

fessor Orfield, now of the Temple University Law School, winner of our Association's Ross Essay prize in 1943. Dean Arthur T. Vanderbilt (now Chief Justice of New Jersey) writes a Foreword in which he makes the challenging charge that among practicing lawyers, law teachers, and law students, "In the field of criminal procedure the indifference is even greater than in respect to civil practice".

From such a starting-point, Professor Orfield has made an informative and remedial presentation. He pays tribute to our Association's long interest and activity in improving criminal procedure, and his volume is amply annotated with reference to "A.B.A. Reports" and the JOURNAL. Basically he gives the picture from the decided cases in virtually all jurisdictions. There is a plenitude of material for the practitioner who wishes to look at his State's procedural rules and decisions against the background of the precedents in American and modern English procedure.

RUSSELL SAGE FOUNDATION, 1907-1946. *By John M.Glenn, Lilian Brandt, and F. Emerson Andrews. New York: Russell Sage Foundation. November, 1947. $5.00. Vols. I and II. Pages 745.*

Lawyers who are called on to advise on problems involving the creation, scope, functioning, administration, etc., of a present-day "foundation" will find a wealth of background experience and material in this graphic forty-year history of this pioneering institution in the field of endowed social work.

THE JUDGE'S STORY. *By Charles Morgan. New York: The Macmillan Company. October, 1947. $3.00. Pages 184.*

In an era in which the acclaimed "best-sellers" are written to a considerable extent by eager but still unskilled young men and women of the Left who make their connections and choose their settings with a view to the value of the "movie rights" under the odious capitalistic system which they seek to undermine, it is refreshing to pick up a novel such as this, which was written to be read and which reflects mature literary craftsmanship. Perhaps naturally, it has also the tolerance and humanity, the open-mindedness and tentative judgments, and the awareness of large and spiritual issues in the seemingly well-grooved lives of worthwhile people, that have been characteristic of English and American fiction.

The story is of a lovable British judge, Gaskony, who has retired from the bench on a comfortable pension to augment his income from lifetime savings, with firm purpose to write a great book, *The Athenian,* to vitalize anew the philosophy of Pericles and the Golden Age. His spirited ward, Vivien, is the daughter of the woman he loved but did not marry; her mother's death left her in his charge. Their contests are with a wealthy and cynical businessman who seeks most of all to put others in a position where they will give up to him whatever they prize most as symbols of their innate self-respect—whatever differentiates them from him.

You can take this story at any level at which you choose to read it, and you will find it well done. The telling of the moods and idiosyncracies of a judge two years retired is very human. If you find only the tale of an old judge ruined by a rich man's machinations and of the menace to the happy marriage of a lovely young woman in whom Gaskony has instilled his sturdy faith from the classics, you will read with a mounting tension. But the famed author of *The Fountain* seems to have written with a larger symbolism the story of struggles against a tempter who offers all things to the man and woman who will betray their own souls for comfort or for gain. Is not that the "siren song" of arbitrary power, of totalitarianism, today as it was in Hitler's day?

To "split your integrity, divide your forces", says Gaskony, has "consequences always the same, on the battlefield or in Paradise". "Evil isn't an army that besieges a city from outside the walls. It is native of the city. It's the mutiny in the garrison, the poison in the water, the ashes in the bread." Passages in the Odyssey and John Milton have new meaning when you have come upon them in this book. There are some things in it as moving as the epic last chapter of Henry George's *Progress and Poverty,* "The Problem of the Individual Life". The book is not getting a good press from the bright-eyed reviewers who tout plays, books, and motion-pictures that contain preachments against the American traditions of individual life—brilliant egoists who would reject an opportunity to say they are not Communists. Maybe you would enjoy it as I did. W. L. R.

OPERATING UNDER THE TAFT-HARTLEY ACT: A PRACTICAL EXPLANATION OF HOW THE NEW LABOR LAW WORKS. *By Max Malin and S. Herbert Unterberger. Washington, D. C.: Labor Relations Information Bureau. November, 1947. $1.50. Pages 48.*

This small paper-bound volume attempts a succinct, functional arrangement of the new Act in relation to recurring day-to-day problems. Such an approach was adopted evidently to show the impact of the Act on some eight significant situations: (1) Organizing activities; (2) negotiations; (3) grievances; (4) expiration of contract period; (5) strikes and lockouts; (6) representation; (7) "union shop" authorization; and (8) remedies for unfair labor practices. Where conflict or ambiguity exists, that is pointed out. The volume takes no sides and is accurate as far as it goes, but it covers too much territory in too few pages to be very helpful to a lawyer who needs more than "high-lights" of the new Act. Some details of the law have been changed since the brochure was printed; e.g., the NLRB has overruled General Counsel Denham's stand as to the filing of "non-Communist" affidavits by top CIO and AFL officials.

Lawyers *in the News*

Joseph M. PROSKAUER

▪ A significant tribute to public service by an American lawyer was given at the Hotel Plaza in New York City on December 4, when more than 700 persons attended a dinner in honor of Joseph M. PROSKAUER, of the New York Bar. The ostensible occasion was his 70th birthday; but, as John W. Davis, toastmaster of the evening, quickly pointed out: "I see before me and around me many men—no women—who long ago attained the Scriptural age; but no one gave any of us a birthday dinner at seventy". Present were many retired and active judges, practising lawyers of all ages, teachers of law, and business men of the metropolis and other centers—men and women of all races and religious and political affiliations—who joined in paying respects to a lawyer whose outstanding labors in public causes commanded their respect if not always their agreement.

Speakers were Former Governor Nathan L. Miller, who told of PROSKAUER's prowess as a lawyer, Former Governor Herbert H. Lehman who told of the honor guest's humanitarian activities, Clark M. Eichelberger who told of incidents in which PROSKAUER was a leader during the San Francisco Conference, and Francis Cardinal Spellman who praised his services to law, justice and fair play. The guest of honor made a brief response.

PROSKAUER was born in Mobile, Alabama, in 1877, was graduated from Columbia University and Law School, was admitted to the New York Bar in 1899, and quickly won distinction as a trial and appellate lawyer. Appointed to the State Supreme Court in 1923, he was called on to serve in its appellate Division for the First Department. After four years on the bench, he resigned in order to return to the general practice of law, in which he has maintained first rank in both trial and appellate work.

His earliest activity in the public interest was in the laborious tasks of the legislative committee of the Citizen's Union, so well chronicled by Julius Henry Cohen in *They Builded Better Than They Knew* (33 A.B.A.J. 344; April, 1947)—a function long since taken over largely by the Committee on State and Federal Legislation in the local Bar Associations.

He early became closely associated with Alfred E. Smith; in the opinion of many, his political skill and daring tactics were the decisive factors in Smith's defeat of Charles S. Whitman for the governorship of New York in 1918, as well as in Smith's defeat of Governor Nathan L. Miller in 1922. PROSKAUER remained Governor Smith's closest adviser and figured largely in Smith's nomination and campaign for the presidency in 1928.

A life-long Democrat, he continued high in the councils of his party until 1944, when he publicly declined to support a fourth term for President Franklin D. Roosevelt. His public endeavors along with his hard work at the Bar have been many and varied. He was a leading member of the Charter Revision Commission of 1936, which prepared New York City's basic law. In 1945 as consultant and spokesman for the American Jewish Committee during the San Francisco Conference, he was the outstanding leader in the successful fight for the insertion in the Charter of the United Nations of the express mandate for an international Bill of Rights, now being formulated at Geneva. Several of his arguments in San Francisco are recalled as models of succinct and effective presentation.

PROSKAUER has been a member of our Association since 1907, and is at present a member of its committee headed by John W. Davis, which is offering to all American lawyers an opportunity to contribute toward the restoration of the Inns of Court. PROSKAUER is serving his second term as President of the New York County Lawyers' Association, the largest of local Bar Associations in the United States, represented in the House of Delegates by Whitney North Seymour.

The historic declaration in the United Nations Charter pledging international cooperation for "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion", was won by PROSKAUER more than any other. The occasion which honored his natal day really paid tribute to much more than a fighting lawyer. Cardinal Spellman put the spirit of the gathering very simply when he said:

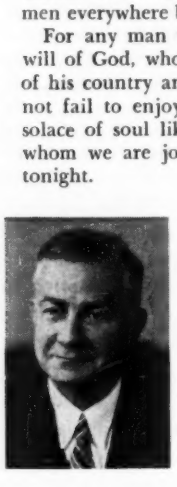
> The history of the United States is the story of the ceaseless struggle of good and brave men to keep alive our ideals and ideas of liberty and democracy, and to defend man's glorious God-given rights. Justice PROSKAUER has been graced with the power of mind and strength of heart to cherish these treasures which he has ever helped to defend and preserve in the same spirit with which they were fought for and won.
>
> None better than he knows that disunion, dishonesty and disloyalty are enemies, not alone of America, but

of all mankind. He knows that if nations of free men are to endure, then must they dedicate and ever rededicate themselves to the glorious mission of respecting God's image in man and the great task of protecting man's natural rights.

Too often do we Americans forget our heritage of freedom; too often do we neglect to put upon the precious things of life their proper price. Love of God, love of man and love of country are the life springs that should inspire us to defend America against anyone, any nation, any ideology that would wrench from us this heritage and destroy our democracy—that democracy and those human rights Justice PROSKAUER has ever cherished and to which he has dedicated his long, fruitful life and his many works.

Today man is here; tomorrow he has disappeared, and when he is out of sight, quickly also he is out of mind. But if we keep our hearts lifted to God, unyielding to evil and immune from greeds and prejudices, then shall we become through our good deeds an enduring part of America's heritage. And the daily prayer, the constant hope, the lifelong work of every man should be toward this goal—that all men everywhere be free.

For any man who seeks to do the will of God, who works for the good of his country and his neighbor, cannot fail to enjoy internal peace and solace of soul like unto the man for whom we are joined here in tribute tonight.



Justin MILLER

■ Chairman of the Advisory Committee on Citizenship appointed by the Attorney General to further the program to emphasize the meaning and worth of American citizenship to the alien seeking naturalization and to the naturalized citizen, is Justin MILLER, member of our Association since 1926, formerly an Associate Justice of the United States Court of Appeals for the District of Columbia, now the President of the National Association of Broadcasters after a diversified career of capable service as a teacher of law, practicing lawyer, jurist, and leader in activities of our Association.

Serving on the Advisory Committee with him are well-known judges and lawyers, including:

FLORENCE E. ALLEN, of Cleveland, member of our Association since 1921; Judge of the U. S. Circuit Court of Appeals for the Sixth Circuit;

THERON LAMAR CAUDLE, of Washington, D. C., member of our Association since 1946; former President of the Federal Bar Association; Assistant Attorney General in charge of the Tax Division of the Department of Justice;

PHILLIP FORMAN, of Trenton, New Jersey, member of our Association since 1924; U. S. District Judge;

ORIE L. PHILLIPS, of Denver, member of our Association since 1917; Senior Circuit Judge of the U. S. Circuit Court of Appeals for the Tenth Circuit; Chairman of the Council for the Survey of the Legal Profession;

DAN PYLE, of South Bend, Indiana, member of our Association since 1925; Judge of St. Joseph's Circuit Court;

WILLIS SMITH, of Raleigh, North Carolina, member of our Association since 1926; its President in 1945-46.

Among several representatives of the federal government who will serve with the Committee is Henry P. Chandler, member of our Association since 1921, Director of the Administrative Office of the Courts of the United States. The Committee held sessions in Washington in November.

Born in Crescent City, California, in 1888, MILLER's experience in law practice, as prosecuting attorney of King's County (California), as well as in his present capacity since 1945, has made him a staunch champion of the American system of liberty and justice as well as a close student of practical ways and means of mobilizing public opinion in support of free institutions. In the consultative committee convened by our Association last June as to the motion pictures, press and radio (see 33 A.B.A.J. 649; July, 1947), he has been a spokesman for the view that the mass media of communication and public information shall be kept free from control by government and subserviency to administrative agencies, and that they shall assist a sound, militant public opinion in support of basic American ideals. In his new post, MILLER will have the opportunity of rendering patriotic service in acquainting alien applicants for citizenship with the fundamentals of their obligations to their adopted country.

Robert Francis MAGUIRE

■ The President of the United States, through the Secretary of War, has appointed this active Oregon lawyer to serve as a judge on one of the Military Tribunals now sitting in Nuremberg for the trial of Nazi war criminals. MAGUIRE accepted the call to duty, and is now in Germany.

He was born in Toledo, Ohio, in 1886, and was graduated in law at Georgetown University in 1909. In his earliest years he was successively a bank clerk, law clerk, government clerk, court stenographer, and assistant United States Attorney. He got down to the practice of law in Oregon about 1914, and has done well with it. Since 1917 he has been a United States Master in Chancery, and since 1934 he has headed the firm of Maguire, Shields and Morrison, in Portland, Oregon. In politics he is a Republican.

Having become a member of our Association in 1930, MAGUIRE has been a member of the House of Delegates, served three years on the Board of Governors, and was the chairman of the Committee on Labor, Employment and Social Security. He has been the president of the Oregon State Bar and is deemed

to possess excellent judicial qualifications.

His selection for this post of duty brings to mind again the manifest policy and practice, where judicial appointments of a temperary tenure are being made, to secure and name highly qualified lawyers and judges of both parties. No difficulty is encountered in getting first-rate men and giving substantial if not equal representation to both political parties. Where appointments for life to the United States District and Circuit Courts are concerned, the unbroken record is of appointing only men of The President's political party.

Homer FERGUSON

■ When digging for facts and the asking of "whodunit" questions are called for by the majority leadership in the present Senate, a rugged Senator, from Michigan, a member of our Association since 1924, seems usually to get the assignment. To some he has seemed impatient at times to start some large-scale investigating on his own. With 1948 in the offing, the inquiries as to Pearl Harbor and National defense were looked on as "practice sessions" for him, as chairman of the subcommittee delving into the airplane contracts of Howard Hughes, the activities of Major General Bennett H. Meyers, etc., he was really "turned loose" in November.

The "digging" part may come naturally to FERGUSON, because he was born in Harrison City, Pennsylvania, and did a two-year stint with a pick and shovel in the coal mines, while he was still in his 'teens. His idea was to get the money to study to be a physician, but he wound up with an LL.B. degree from the University of Michigan. He had practiced law in that State for sixteen years when he was elected a circuit judge in 1929.

For ten years he devoted himself to unsensational but competent performance of his judicial work, and then he concluded that he did not like much that was taking place in the administration of justice in Detroit and Wayne County. So he started "digging" again, with questions asked of startled witnesses, mostly politicians and racketeers and their victims. Starting in August of 1939, he acted as prosecutor, judge and grand jury for more than three years. When the score was added up, it totalled about 250 indictments, which resulted in more than 200 convictions.

The voters of Michigan thought well of this accomplishment. In 1942 the Republicans nominated Ferguson for the Senate against the popular and sometimes independent Prentiss Brown. So Detroit's "triple-threat" lawyer came to the Senate, where he added to his pointed questioning a penchant for sonorous and scathing denunciation—starting out with international gangsters and throwing in a few domestic culprits for good measure. He also developed some virile ideas as to the types of men whom the Senate should confirm for judicial and quasi-judicial positions; he could not see why they should be opportunists or adherents of Left Wing philosophies of law and government. He wanted to see some old-fashioned American lawyers on the bench and in the agencies.

Meanwhile, Ferguson has worked industriously on the constructive side of legislation and has tried to learn the knack of running debate and the handling of measures on the floor. He brought forward the idea which many persons look on as a likely further step on the law of labor-management relations—the establishment of some type of Labor Courts and the availability of judicial process for the fair and impartial determination of various issues arising in industrial strife. Merritt A. Vickery discussed Ferguson's proposals in our June issue (page 548); the statement by Senators Ferguson and Smith in support of S. 937 was quoted from at page 551. The Taft-Hartley Bill was given the right-of-way and is now the law of the land, but Ferguson bides his time and believes that Labor Courts will be needed.

Our Association Will Assist National Conference as to Marriage and Divorce Laws

■ Our Association will render such assistance as it can as to legal aspects, to the National Conference on Family Life, which has been convened by some 120 sponsoring organizations, to be held in the White House, Washington, D. C., on May 6-8. The Board of Governors in Chicago on November 7 voted that our Association should accept the invitation to be one of the sponsoring organizations, but its participation will be limited to the "Legal Section—laws as to marriage, divorce, etc." No financial commitment or liability of our Association is involved.

The total membership of the sponsoring organizations is stated to be about 40,000,000. Practically all groups embracing the professions, labor, industry, education, religion, public and private charities, scientific and social interest, etc., are represented. The chairman of the Board of Trustees in charge is Eric A. Johnston, of the Motion Picture Association. Charlton Ogburn, of New York and Washington, member of our Association since 1935, is general counsel for the Board. Laws relating to marriage, divorce, adoption, legitimacy, etc., will doubtless figure largely in the deliberations and any recommendations of the Conference. The Conference will deal with problems that are among the most challenging and difficult on the American agenda. There can be no single or simple solution. The Conference

(Continued on page 52)

AMERICAN BAR ASSOCIATION
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EDITORIAL OFFICE

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■ *"To Insure Domestic Tranquillity"*

The founders of our republican form of government stated their paramount aims in the Preamble of the Constitution. The enumeration of these objects was not intended as an independent grant of power to any branch of the federal government, but the Constitution did not "first begin with that which followed the Preamble". "We, the people of the United States, in order to" accomplish stated objectives which were much debated in ratifying conventions, "do ordain and establish this Constitution".

The scope of grants of power and of limitations on powers has long been interpreted in the light of these declared aims. To "provide for the common defense" has been regarded as confirming the grant of plenary powers by clauses neither comprehensive nor specific. "To promote the general welfare" has been treated as a concept that broadened continually the interpretations of the "commerce clause" and other provisions, into ramifications which the founders could not have had in mind. Such emphasis has been put on the declared aims that at times the "common defense" and "general welfare" clauses have been invoked as tantamount to grants of power.

In this crisis in our country and in the world, we submit for consideration that the need for legislation and for administrative action, as well as their validity, should be examined in the light of the constitutional objective—"to insure domestic tranquillity".

Events in France and Italy, and some in Canada and our own country, have revealed the extremes of destructive action which are resorted to by agents of the Soviet Union and their followers, operating in the guise of a political party. Chaos and confusion, violence and bloodshed, rioting and paralysis of the economy, hunger and hardship on the part of uncounted millions of helpless men and women, are the strategy and the reliance of world Communism.

In our own country, the forces of disorder and disruption are gathering for strife that will come if and when the orders for it are issued from the faraway Kremlin. The FBI says the Communist party is a criminal conspiracy against the United States. In the shadow of church and school, library and university, dock and factory, the followers of the "Communist party line" are striving to increase their numbers. In the absence of legislation to protect against these infiltrations and outlaw the abuse of our political-party system, severe strains are being put upon our historic belief in freedom of speech on one hand and our determination that our government and our communities shall not be deprived of power to defend and protect our free institutions, on the other.

Very many of our people wish and expect Communist propaganda and demonstrations to be excluded from our governments, from our motion pictures and newspapers and radios, from our university campuses and public schools and "key" industries; yet no statutory standard has been set up, or clear administrative duty vested, to mark the metes and bounds of such exclusion and make it effective. Even the disclosure of the extent of Communist infiltrations is protested, and an anxious solicitude is expressed for the "rights" of those who have wantonly trampled on human rights in every country in which they have seized power or gained strength.

Forcibly breaking up Communist meetings on college campuses or in State armories is not an American way of dealing with those who jeopardize our "domestic tranquillity". Such incidents are the results of the lack of law and its enforcement. Ways should be speedily sought and found for safeguarding the substance of cherished freedoms and for preserving at the same time the power of the people and their government to protect themselves.

In the same American spirit in which legislation has been drafted and upheld to "promote the general welfare" and to "provide for the common defense", may not precedents be now found therein for plenary measures to "insure domestic tranquillity"?

■ *Bi-Partisanship and Non-Partisanship*

The felicitations and best wishes of the profession of law throughout our country go to the State of New Jersey and to its first Chief Justice under its new Constitution—Dean Arthur T. Vanderbilt, long a dynamic figure in our Association's working group. Our sense

of loss of his participation in noteworthy projects to which he was giving himself without stint is compensated by the realization that the specific things which will be done under his leadership in New Jersey will point the way to adaptations and adoptions in other commonwealths. Elsewhere in this issue, Nicholas Conover English, of the New Jersey Bar, tells interestingly the thorough-going, even drastic, changes which were decisively approved by the voters of New Jersey, for the simplifying and modernizing of the structure of its Courts and its rules of procedure in Courts.

The appointments made by Governor Driscoll in December to the State's new seven-member Court of ultimate appeal—the Supreme Court—reflect and remind of the way in which a practice, and then a tradition, of bi-partisanship are fostered as to the judiciary in most or many States which have a robust two-party system, leading finally to judicial selection for qualifications in experience, temperament, courage, freedom from subservience to party organizations and juristic ideologies—the substance of non-partisanship and independence in the judiciary.

An outstanding fact is that the American lawyers truly qualified for judicial office are not at all of one political party or faith, and that genuine bi-partisanship may lead easily to selection for fitness—virtual non-partisanship. A system or practice under which selections for appointment or election to the bench are made wholly from one political party leads to making them mostly as a reward for service to party organization, disregards the bi-partisan character of the qualified Bar, and overrides the patent fact that under a two-party system a decent sense of fairness requires that substantial representation in the Courts be given to qualified lawyers of both political parties.

New Jersey has had a tradition that runs back at least to the war between the States, for a substantial representation of both parties, virtually a bi-partisan division, in the judiciary. At first it applied only to the old Supreme Court and the Court of Errors and Appeals; justified by its results, it was extended to the Court of Chancery. New Jersey is normally a Republican State, although it has elected men like Woodrow Wilson, Judge George Silzer, and A. Harry Moore, as Governor.

Irrespective of party control of appointments by the Governor, the practice and tradition of bi-partisanship in judicial selection were strengthened and extended. It was next adopted in its District Courts with a jurisdiction up to $500. Then Governor Silzer, a former Circuit Judge, applied it to the Circuit Courts. Finally it was extended to the Common Pleas judges where there is more than one in a county. There has been no turning back. There is nothing about it in the State Constitution, old or new; but the principle is as fixed as though it were written there.

When the Republican Governor Driscoll made his seven appointments to the new Supreme Court, his choice had to be from among incumbent judges. He could easily have taken all of them from experienced members of his own party. But he had no thought of doing that, and the people of the State would have arisen in protest, during the seven days required between appointment and confirmation, if he had disregarded the deep-rooted tradition. He named three judges (Heher, Ackerson and Wachenfeld) who by party affiliation were regular Democrats. He named three (Burling, Case and Oliphant) who are known Republicans. All of the six were men of proved capacity for judicial work. As Chief Justice he chose Arthur T. Vanderbilt, outstanding for qualifications, a militant independent of Republican faith.

This is strikingly unlike the record and practice of

limiting appointments to life tenure in the District and Circuit Courts of the United States unvaryingly to members of one political party—that of the appointing power—strikingly unlike the imbalance under which the federal judiciary has been made to consist of 237 members of one party and only 74 of the other, as recently reported by Peyton Ford, Assistant to the Attorney General, with only one representative of the majority party in Congress among the nine members of the Nation's Supreme Court. Ordinarily, the relative proportion of the representation of lawyers of the two parties in the judiciary of a State or the Nation would be without serious significance if the selections had been made for fitness; but a substantial representation of both parties is salutary, and an imbalance attributable to partisan selection tends to lessen the confidence of the whole people in their Courts.

■ Nominations for the International Law Commission

Under the Statute of the International Law Commission, which corresponds in many respects to the Statute of the International Court of Justice, the Government of the United States may nominate before next June 1 four lawyers or jurisconsults to be voted for in the election of the members of the Commission when the General Assembly meets next fall in regular session. The Statute of the Commission is published in full on pages 53-55 of this issue.

Of the four nominations which the United States may make, two may be Nationals of this country.

It would seem to be of the highest importance for the future law and justice in the world that, wholly disregarding party and political service, the American nominations shall be lawyers or jurists of the highest possible prestige, leadership and scholarly attainments in that field of law.

■ Keeping Up-To-Date on Legislation and Decisions

We suggest for the consideration of all concerned that Dean (now Chief Justice) Arthur T. Vanderbilt and Professor Alison Reppy, in initiating an *Annual Survey of New York Law* within a formidable single issue of the *New York University Law Quarterly* (as reported in our December issue—page 1184), have started a practice, perhaps an institution, which may commend itself to law faculties, boards of editors of law reviews, and Bar Associations, in other States. To try to keep the practicing lawyer abreast of the decisions and legislation in his own State, in the fields of law which he studied and learned something about in his law school, is a primary task in "continuing the post-admission education of the Bar".

To such extent as our files permitted (we fear incompleteness and confess fallibility of research), no State except perhaps Illinois and Missouri has had one publication which covers both State legislation and Court decisions, regularly and annually, as an organized project. In other States, the coverage seems to be incomplete, divided between different publications, or irregular in appearance, especially during the war years, when promising ventures had to be abandoned or suspended.

The *New York State Bar Bulletin* has excellent articles each year which review legislation on selected subjects; but there is no inclusive regular coverage of all legislation and decisions. Law reviews, Judicial Council bulletins, and State Bar journals, in many States (perhaps notably Kansas and Louisiana) review comprehensively the work of legislative sessions or the decisions of particular Courts. In Missouri, the *Missouri Law Review* has reviewed the decisions of the State Supreme Court annually since 1936, devoting its November issue to the purpose; but it has not covered legislation. The *State Bar Journal* with fair frequency during the past two years has reviewed legislative enactments and the decisions of the State Supreme Court since 1941. In Illinois, the *Chicago-Kent Law Review* annually since 1938 (one issue since 1946) as to judicial decisions, the *John Marshall Law Quarterly* as to decisions and legislation (in an abbreviated and incomplete form) since 1938, and the *Illinois Bar Journal* as to State Supreme Court decisions since 1942, have given a non-integrated coverage. The *Indiana Law Journal*, published by the State Bar Association in conjunction with the Indiana University School of Law, devoted its last (July) issue to Indiana legislation for 1947, with a competent coverage of subjects. The *North Carolina Law Review* devoted its June (1947) issue, prepared largely by the faculty of the Law School of the University of North Carolina, to a survey of such statutory changes as would be of particular interest to lawyers.

The foregoing is by no means all we have found; we shall probably be castigated for omissions; we have taken instances which denote hopeful beginnings, as organized projects, of a highly useful annual service to lawyers. We shall await and report instances in which an inclusive coverage such as is provided by the New York project is made available in other States.

■ Our Younger Lawyers Menaced by Increased Costs of Living

We are increasingly disturbed about the plight and the future of the younger men and women of our profession—particularly the returned veterans who, starting their professional work a few years older than the usual novitiates, are being beaten down and discouraged by "inflation" conditions they cannot surmount. We do not suggest that their travail is greater than that which confronts virtually all members of the profession and other persons of the "middle" class, but their extremity seems an especial injustice.

Most of these young men were married during the war years and have children. December figures from the Bureau of Labor Statistics show that under the spiraling costs of today, the cost of "modest but adequate" living according to decent standards has lately increased about $450 a year and has become, for a family of four, at least $3000 to $3700, depending on the locality. Opinions may differ as to details of precise figures, but it is obvious that a young lawyer cannot maintain and educate his family as should be, on much less than some such amount.

Yet in relatively few cities, even the largest, and in no large percentage of the better law offices, is starting pay for young lawyers in the $3000 to $3700 range. Nor does it dependably move upward into that range for a year or two or three. Only the "top" men taken into the best law offices get a starting pay of $3600 a year or more—and that only where an adequate budget for a young lawyer and his family exceeds his starting pay. Only jobs in government offer such pay. We cannot prudently leave our profession open only or mostly to young men or women from wealthy or well-to-do families who can support them for years; we cannot inculcate the idea that young lawyers can find security only on the payrolls of government.

Such conditions menace the independence, the vigor, and the security and happiness, of our younger lawyers. The problems are very difficult, but the need for facing them is great. Each law firm and office should look at the facts as to its own. For each law firm to pay a starting wage adequate under the inflationary costs, with reasonable opportunities for advancement in compensation, is an investment in the future of our profession and in the resistance to defeatist propaganda.

Editor to Readers

We are experimenting with a new utilization of our "cover page"—to try to use it to "tell and sell" the work and objectives of our Association, along with news of our profession.

• • •

Our reduced number of pages per issue—due to present costs of printing and paper—is compelling us to curtail the length and number of articles published, and to omit or delay a great deal of material which we should publish. Unless our revenues from advertising are increased or printing costs go down, our curtailment and condensation will have to continue.

• • •

Current experience leads us to comment on a characteristic of members of our profession. In the daily press and in magazines, everyone is accustomed to "boiled-down" news, to brief summaries or excerpts of speeches, to succinct and condensed articles on all manner of subjects. Not so as to what lawyers and judges write for publications of our profession. If they write and contribute an article, or make a speech, or supply material for an informative item, they expect it to be published in full, just as it was written or orally delivered, even though some condensation may improve its readability and unity, perhaps bring it within lengths where it will be read at all. A law magazine of sharply limited space cannot be edited and published on that basis. Many articles which we would have been glad to publish have had to be returned because they exceeded our limits of space, and their authors could not endure the pain of cutting. Limitation on the length or articles has to be our rule; we believe our readers will like it. The reduction in number and the exclusion of much worth-while material we regret.

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In his Foreword to the *Annual Survey of New York Law,* Dean Arthur T. Vanderbilt, now Chief Justice of New Jersey, quotes from an autobiographical letter which Chancellor Kent of New York wrote in 1828 to Thomas Washington, telling how he spent his time during his early years at the Bar: "From 1788 to 1798 I steadily divided the day into five portions & allotted them to *Greek, Latin, law and business, French & English.*"

Dean Vanderbilt added that it is "no wonder" that Kent "was equipped to become a great judge in 1798. Small wonder, too, if the modern practitioner, reading Kent's works, breathes a sigh of envy and regret at his own lack of leisure—no 'Greek, Latin, . . . French and English' for him, except perchance, on weekends or vacations. As the demands of his professional work grow heavier year by year, the output of the legal authority he is *supposed* to know as 'counsel learned in the law' likewise increases by leaps and bounds. The average lawyer has little time—and in some cases, it may be suspected, little desire—to master the developments in the law outside the field of his own specialty."

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If you are willing to read a brilliantly written article which will make you proud of our profession's contributions, long ago as ever since, to our country's institutions and strength, we commend Donald Culross Peattie's sketch of John Marshall in the December issue of *Reader's Digest.* We doubt if anyone ever wrote for more than 12,000,000 non-lawyer readers a more vivid and inspiring account of an American lawyer and judge.

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In the December issue of *Atlantic Monthly* (which has cast off its dignified mien and entered the scramble of the colorful for circulation), you will do well to read Reginald Heber Smith's "Dishonest Divorce". This article was written and submitted for the JOURNAL; but when the opportunity came to give its message to a far greater number of readers, we gladly yielded publication rights to Richard Danielson's rejuvenated monthly. Mr. Smith's "new premise" is worth pondering.

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It has recently been reported that the Executive branch of the federal government employs 45,000 "press agents" and "publicity men" (23,000 full time—22,000 part-time). These include thousands of highly trained and skilled newspapermen and women, who otherwise

would be employed usefully by newspapers, magazines, etc. The 1946 expenditures by the Executive branch for "publicity and information" totaled $75,000,000. Whenever any action or policy of the Executive branch is attacked as arbitrary or violative of the rights and interests of individual citizens, a large number of these highly paid experts in "press releases" which "sell" the government's side go into action in defense of the government against the citizen and taxpayer. In addition to the 45,000 "press agents", there are a large number of agency members, and department and bureau heads, whose wealth of specialized and technical "administrative experience" to which Courts "defer" was gained by wielding a "heavy black" pencil and pounding a typewriter on a "re-write' desk of some daily paper. Their talents, too, are mobilized.

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We note in passing that the number of these recognized "press agents" on the public payroll exceeds by about 4000 the total membership of our Association. The federal funds at their command, and actually spent by them in 1946, are nearly 200 times the total annual budget of our Association. The membership and resources of our Association seem lamentably small for its tasks. The figures throw light on the difficulties encountered by lawyers and other citizens when they try to defend public or private rights and interests against their government. Yet if each lawyer will do his part in his home community and will cooperate with its independent newspapers for the continual dissemination of the principles of constitutional government and a "free enterprise" economy, we do not doubt that the free citizenry can prevail, notwithstanding the 45,000 "press agents" at public expense.

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Trying to think through, to the strains of music, some of the reasons why Mr. Average Citizen does not understand law under a federal system and does not think that lawyers and Bar Associtions do what they should to make it understandable and fair, we did not turn off WOV's well-directed American Family series when it came on the air December 10. What was said to be an actual case was dramatized, and was listened to by probably several thousand times as many persons as will read this item. A woman's second husband wished and asked for a divorce. They lived in New York. She refused to let him have his way. He told her that her divorce from her first husband, which had been regularly granted to her by the Court in North Dakota, was not recognized in New York. So she had committed bigamy and was living in sin, and he could get a divorce. She went to her lawyer, hoping to be told it wasn't so. He told her that her second husband (?) was right, and plunged her into misery by adding that if her husband divorced her on those grounds, her son by her second marriage would "automatically become illegitimate". What did the listeners think of the law and the inaction of Bar Associations? How can we counteract that by any "Public Relations Program"? Does such a situation call for uniform marriage and divorce laws as Senator Capper has proposed or for new interpretations of the "full faith and credit" clause of the Constitution as Senator Pat McCarran has urged? Our Association is trying to help the National Conference on Family Life find the answers. Until then, does not the fair dramatization of such an actual case put the law and lawyers "on the spot"?

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We have to ask our non-member subscribers to accept an increase in their subscription price to $5.00 per year. The $3.00 rate was established when the cost of printing an issue of the JOURNAL was about half what it is today. We have to follow the course of other publishers in increasing our price. The $5.00 rate will apply to new subscriptions and renewals received after December 31.

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With the death of Judge John Bassett Moore, who joined our Association in 1889 and was lately its senior member in length of membership, the records of the Association indicate that the honor of seniority passes jointly to John P. Bartlett, of New York, and Samuel Williston (see 33 A.B.A.J. 1133; November, 1947), of Massachusetts, both of whom became members in 1891. Mr. Bartlett is 89 and Professor Williston 86.

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In determining what steps shall be taken to improve further the administration of justice in our States and cities, we submit for consideration that the generally neglected step-children of our judicial system have been the police courts, traffic courts, recorders' courts, domestic relations courts, magistrates' courts, small claims courts, etc. Collectively, such tribunals are the most important trial Courts in our States in their relationship to and effects on the daily lives of the largest number of citizens. Here are tasks for judicial statesmanship. A primary objective, too, may be the bringing together, into one Court, of jurisdiction over all civil and criminal matters which have to do with the family as an institution—divorce, custody of children, adoption, legitimacy, juvenile delinquency, non-support, etc.—now usually scattered among at least several Courts.

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There are signs of revival of interest in basic literature of American constitutional history as to our republican form of government. One of these is that Doubleday and Co. will publish on January 8 *The Enduring Federalist,* assembled by Professor Charles Beard. The most significant of the Federalist papers have been selected, edited and interpreted by the virile historian, who gives background details.

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The favorable results of friendly cooperation rather than the making of speeches and the passing of resounding resolutions have again been instanced by the action of the Motion Picture Association of America on December 4. Last June our Association and its Section of

Criminal Law conducted a conference in Washington with leading representatives of the motion picture, radio and newspaper industries. (See "Movies, Press and Radio: Conference Conducted by Our Association", 33 A.B.A.J. 649; July, 1947). Two matters were principally discussed: The presentation of "crime" in such a way as to glorify lawlessness and contribute to juvenile delinquency, and the caricaturing or other unfavorable portrayal of judges, Courts, lawyers, etc. The discussion was candid and objective, as our report of it showed. No resolutions were passed, but a consultative joint committee was continued. Progress along the lines sought by the conferees has been observable, we think, ever since. Definitive action by broadcasting chains, stated to be due to representations by our Association and other organizations, was announced (33 A.B.A.J. 916 and 1024; September and October, 1947). On December 4 the Motion Picture Association took widely-publicized action to stop the distribution of new and old films glorifying gangster names and criminal practices and also the use of salacious and obscene titles for pictures. Some of the "gangster" films had already been produced; others were being prepared for production. Newspapers in numerous instances gave credit to our Association for its pioneering help against motion pictures which inculcated the idea that "crime pays" well enough to warrant the risk. The chief credit belongs to Eric Johnston and his associates among the "top-flight" producers. They needed only the intervention and friendly suggestions of national organizations such as our Association to bring about emphatic action to end abuses.

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The realities of the education to be imparted for leadership in the professions are being increasingly faced on a national basis. An Inter-Professions Conference on Education for Professional Responsibility will be convened at Buck Hill Falls, Pennsylvania, on April 12-14, to bring together outstanding educators in the fields of law, medicine, engineering, business and religion. All aspects of the problems as to the course of study leading to the first professional degree will be canvassed, particularly the war-created problems of education for the law and other professions. We have long been inclined to believe that the education given *for* law, rather than *in* law, may determine the future of our profession and of our republican form of government as well. *Are* young men and women being educated to believe in the law and free institutions, in the profession of the law as an outstanding opportunity for service to the public; e.g., both government and private clients?

The representatives of the profession of law in the Conference Committee, representative of five professions, are Dean Arthur T. Vanderbilt, now Chief Justice of New Jersey; Professor Lon Fuller, of the Harvard Law School, whose objective studies of law school curricula have been sure-footed; and Dean Wilbur G. Katz, of the University of Chicago Law School, who has explored advanced ground. The Carnegie Corporation and the Carnegie Institute of Technology are in the foreground of the preparatory work. If soundly-grounded American lawyers are to come out of law schools they need to enter law school with a thoroughly-instilled and deep-rooted conviction that the American concept of training for law practice and the defense of our form of government are the objectives of sound education for the law. Will our colleges and universities meet that standard and test, of education *for* the law and other professions?

"Bulwark Against Tyranny"

(*Editorial in the Cleveland* Plain Dealer, *September* 22)

The profession of law is indissolubly linked with the processes of democracy. Each step that profession takes to make the attainment of justice, for individuals and for nations, swifter and more certain, strengthens democracy's bulwark against the gangster who may be a local overlord of illicit enterprises or the megalomaniac who is a whole nation's law unto himself.

It will be the hope of those who know the strength and the devious ways of the forces which democracy is fighting, as hard as it ever had to fight off the battlefield, that out of the 70th annual meeting of the American Bar Association, convening this morning in Cleveland, will come some strengthening of that bulwark, reasons for greater respect for democratically enacted law, and higher hope for the triumph of justice over tyranny.

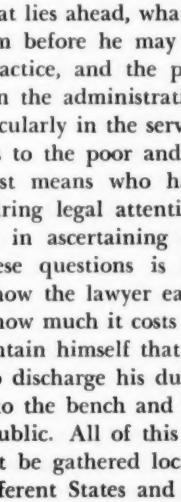
The people as a whole, not just the members of the legal profession, should listen to what is said here by men who bear as heavy a responsibility as any in the English-speaking world for the interpretation of the law, such men as the Chief Justice of the United States, Fred M. Vinson; the Lord Chancellor of Great Britain, Viscount Jowitt, and the presiding justice of Canada's highest Court, J. C. McRuer.

Those who practice law should be alert to the duty of carrying into their everyday professional conduct the high principles which will be set before them here by eminent members of their profession.

Those who practice law are in a calling in which the responsibility to democratic society is very special and very great. Theirs is the responsibility to show the people that justice is more than an abstract noun, as the cynical Jurgen referred to it, and to create an ever wider appreciation of the democratic principle that there is no liberty save the liberty of the law.

We hope that much that is good for democracy will emanate from the session of the American bar and we welcome, with great respect, the distinguished practitioners of the law who will be Cleveland's guests this week.

THE PRESIDENT'S PAGE



TAPPAN GREGORY

■ There are those at the Bar—and the Association is privileged to count no small proportion of them in its membership—who are ever ready to respond graciously and cheerfully to every call for assignment to any task involving service to the Bar or the public, however onerous, and no matter how much engrossed and burdened they may be from day to day with exacting professional duties demanding constant and conscientious attention.

One such who stands in the forefront has just been selected for the difficult undertaking of stepping into the post of Director of the Survey of the Legal Profession recently left vacant when Arthur T. Vanderbilt resigned because of the pressure of exacting duties in his new position as Chief Justice of New Jersey. The designation of Reginald Heber Smith has just been announced by Judge Orie L. Phillips, Chairman of the Council of the Survey.

Director's Statement Clearly Shows Need for Survey

Mr. Smith's first public pronouncement upon taking office gives a clear picture of the need for the Survey and its purpose and demonstrates a grasp and appreciation of the problems involved characteristic of the man.

He pointed out that the purpose of the Survey is to determine what the lawyer does, how he is educated for the work that lies ahead, what is required of him before he may be admitted to practice, and the part that he plays in the administration of justice, particularly in the service that he renders to the poor and to those of modest means who have problems requiring legal attention. Of importance in ascertaining the answers to these questions is the knowledge of how the lawyer earns his living and how much it costs for him so to maintain himself that he may be able to discharge his duties to his clients, to the bench and the Bar and the public. All of this information must be gathered locally and in the different States and nationally; from individual lawyers, from Bar Associations, from judges, law schools, law examiners, and the laity.

Bar's Part in Implementing Constitutional Rights

The new Director trenchantly distinguishes between a democracy and a totalitarian "police state" by calling attention to the fact that in America when a man is unjustly incarcerated it is not the automatic operation of the Bill of Rights or a free and independent judiciary which obtains his release, but this is accomplished through the skill and courage of some high-minded lawyer, who will make application for a writ of habeas corpus.

Upon the information gathered as a result of this Survey depend in large measure the maintenance of and justification for the claims of the profession upon the public for its confidence, for the right of the lawyer to occupy positions of leadership, for improved methods of education and of the administration of justice and of the affairs of the average lawyer so that he may be better able economically to sustain honorably and effectively the burdens of service.

The work of the Survey will probably not be completed in less than five years. It is to be financed by a grant of $100,000 from the Carnegie Foundation and a contribution of $50,000 from the American Bar Association, the total of $150,000 being spread over a five-year period.

Survey Will Outline Way To Improve Profession

The Director will have available for counsel and assistance as he may request it, a Council of distinguished personnel, independent and autonomous, authorized to fill vacancies in its own membership, responsible, as Mr. Smith points out, to the American people to whom the report of the Survey as finally formulated will be directed.

There is, then, in prospect the gathering under brilliant leadership of vital and far-reaching information that will justify us in looking forward with hope and enthusiasm to vast improvement in the qualification and the status of the lawyer and to great strides in the quality of service to be rendered by the Bar and consequent advances in the eternal task of perfecting the administration of justice.

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

■ This time the gifted Librarian of the Middle Temple narrates the steps taken to abolish or eliminate the tax burdens (stamp duties, etc.) long suffered by solicitors and others identified with the profession of law. Britain is tackling an ambitious program, initiated by the Lord Chancellor, for revision and consolidation of the statute law. Such problems have parallels in America, although the angles are interestingly different. Indomitable spirit is reflected in the progress made on repairs and restorations in the Middle Temple—cherished shrine of the common law—toward which all American lawyers are being offered an opportunity to contribute.

■ On June 16 in the House of Commons, Sydney Silverman moved that a clause be inserted in the Finance Bill providing that "so much of the Stamp Act, 1891, as imposes a stamp duty of eighty pounds on articles of clerkship under the Solicitors' Acts" be repealed. In the debate which followed the suggestion received very sympathetic consideration. The Chancellor of the Exchequer said that he did not know why the proposal had not been made before, and went on to say that the tax was one which operates to hinder people with ability, but with not over much wealth, entering this particular branch of the legal profession. He promised, if the particular form of the words of the clause were not pushed to a division, that he would put down a new clause which would give effect to what was desired and substitute a charge of two shillings and sixpence, as in other forms of apprenticeship.

When the new clause was brought up in the House on July 16 it went very much further than the original proposal. It repealed the duties on (a) admission in England of any person to the degree of Barrister-at-Law, (b) admission in Scotland of any person as an Advocate, (c) admission of any person to be a member of either of the Four Inns of Court in England, (d) admission of any person as a Solicitor of the Supreme Court in England, (e) admission in Scotland of any person as a law agent, (f) Faculty licence, Commission or Dispensation for admitting or authorizing any person to act as a Notary Public. The stamp duty on admission as a Solicitor under S. 35 of the Solicitors' Act, 1932, was also repealed. Stamp duty on Articles of Clerkship whereby any person becomes bound to serve as a clerk in order to obtain his admission as a Solicitor, has been reduced from £80 to two shillings and sixpence. The duty on annual practicing certificates, which varied according to date of admission to practice and distance from London, is reduced to one-twentieth of the amount previously paid.

Students admitted to any of the four Inns of Court had, formerly, to pay a stamp duty of £25 and, upon Call to the Bar, a further £50. These duties have now been repealed.

In referring, at the Annual General Meeting of the Law Society, to the abolition of the duties on solicitors, the retiring President, Sir Douglas Garrett, said that ever since the end of the Eighteenth Century the solicitors' profession had borne a heavy burden of special taxation. It was in 1784 or thereabouts that Pitt, one of whose claims to fame is that he instituted income tax, was looking round for desirable objects of taxation; and for some reason his eye fell upon attorneys, who had to share with soap, pawn-brokers, gloves and mittens the burden of a fresh tax. Ever since then the solicitor has been taxed, if not from the cradle to the grave, at least from the date on which he first enters upon articles until the date when he retires from practice.

Repairs in the Middle Temple

Some progress has been made during the past year in restoring buildings seriously damaged during the war. At No. 2 Plowden Buildings the two top floors on either side the staircase, which were entirely burnt out, have been reconstructed. The opportunity was taken to make the accommodation more convenient in each of the four sets of chambers concerned, and the result is a great improvement upon their pre-war design. Owing to the greatly increased cost of everything since the war, together with the need to secure further sums for restoration, it has been necessary to increase the rentals for these reconstructed residential chambers by approximately 40 per cent. They were all let to tenants before the work was completed.

The two top floors of No. 5 Essex Court and No. 4 Brick Court, which were also destroyed by fire are, similarly, being rebuilt, but it will be some time before the work is finished and the chambers re-occupied.

Much work has been done on the Middle Temple Hall. At one time it was hoped that its restoration might be sufficiently advanced to admit of its again being used by members at the end of this year with, perhaps, a resumption of the custom of keeping terms by dining therein. But, owing again to shortage of men and materials, that hope has been deferred *sine die*. All of the windows, however, have been restored to their former glory and it is interesting to note that the solid oak frame of the large south bay window (sometimes called the Peers or Chancellors window) was not damaged, whereas the stonework of the side windows was shattered. These, how-

ever, as stated, have all been repaired and the original stained glass, which had reposed in a place of safety for several years, has been refixed. Many of the coats of arms of readers of the Middle Temple which had been torn from the walls have been refixed and all of them cleaned.

A great deal has yet to be done. The kitchens and service lifts were wrecked and much reconstruction is necessary before full use can be made of them again. The huge hole torn in the east end of the Hall has yet to be filled and the window at that end replaced. The roof itself was badly damaged by explosion and fire, and the handsome oak screen, still in its place of safety, has yet to be pieced together and re-erected. Licenses for much of this work are still ungranted and it is impossible to say when the necessary permission to proceed will be obtained.

Statute Law Revision and Consolidation

In the House of Lords on July 30, in reply to a question by the Marquess of Reading, the Lord Chancellor (Viscount Jowitt) said that the Government has for some time been gravely concerned by the chaotic condition of the Statute Book and have had under consideration plans for reducing it to order. The problem is no new one, for intermittent attempts to improve the form and arrangement of the statute law can be traced at least to the time of Edward VI, but under modern conditions the public interest is becoming increasingly affected. It is no longer lawyers alone who are mainly concerned in ascertaining the law but a much wider section of the public, comprising central and local government administrators, representatives of employers and workers, and offices of public bodies and private associations. For all such the Statute Book has become a necessary "tool of their trade" and it should be made an efficient one.

Lord Jowitt stated that a study of the long history of previous endeavors in this field showed clearly that no real improvement can be accomplished until the business of statute law reform receives a definite place among the duties of Parliament and of the executive Government of the day. The first step, he said, was to establish in the Office of the Parliamentary Counsel a separate branch devoting its whole time to the preparation of consolidation bills and codification bills, and members of the staff engaged in that branch would not be engaged upon other work. He emphasized that the work of statute law reform has so fallen into arrears that continuous effort extending over ten or fifteen years will be necessary before the Statute Book can be reduced to a condition which may be regarded as satisfactory.

He had decided that the Statute Law Committee first appointed by Lord Cairns in 1868 "to make the necessary arrangements and to superintend the work of preparing an Edition of the Statutes Revised" should be reconstituted and the members of such committee would be as follows: Chairman, the Lord Chancellor; Deputy Chairman, Sir Granville Ram; the Attorney General; the Lord Advocate; three Peers (including one Lord of Appeal in Ordinary); three Members of the House of Commons; Counsel to the Lord Chairman of Committees; Counsel to Mr. Speaker; First Parliamentary Counsel; Legal Secretary to the Lord Advocate; Permanent Secretary, Treasury, or representative; Permanent Under Secretary of State, Home Office, or representative; Permanent Under Secretary of State, Scottish Office, or representative; Permanent Secretary, Lord Chancellor's Department; Secretary of the Cabinet, or representative; King's Printer of Acts of Parliament, and a Solicitor.

The terms of reference to the new Committee would be revised to read "To consider the steps necessary to bring the Statute Book up to date by consolidation, revision and otherwise, and to superintend the publication and indexing of Statutes, Revised Statutes and Statutory Instruments."

The Lord Chancellor uttered two words of warning: *First,* the work of consolidation was not concerned with improvements of the substance of the law, but only of its wording and arrangement; and *second,* although laymen would benefit from statute law reform, it would only lead to future disappointment if the setting up of the machinery now proposed gave rise to expectations that the law could be so improved as never to call either for hard thinking or for expert assistance.

Marriage and Divorce Laws

(Continued from page 43)

will be publicized conspicuously, and should have at least a vast educative effect. The foundations may be laid for constructive proposals for legal solutions.

Numerous State and local Bar Associations have been actively at work as to marriage and divorce laws, etc. Our Association's Award of Merit was given to the Chattanooga Bar Association for its remedial work in Tennessee in this field (see our August issue, page 802; November issue, page 1160). Several lawyers active in our Association have been assisting in the preparatory work for the Conference.

The Board of Trustees has asked our Association to take charge of the Legal Section of the Conference, organize its Committees, plan its preparatory work, etc. President Gregory has designated for this organizing purpose Reginald Heber Smith, of the Massachusetts Bar (Boston), who represents also the National Association of Legal Aid organizations. Members of our Association who have views for consideration, or are willing to work, in this field of law are asked to write Mr. Smith.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

General Assembly Acts to Promote the Progressive Development of International Law

■ When the General Assembly met at Flushing Meadows in September, it had on its agenda the report of its special Committee on the Progressive Development of International Law and Its Codification (33 A.B.A.J. 765, 831; August, 1947). Resolutions on the implementation of this report by the creation of an International Law Commission were presented immediately by the delegations of the United States and France (U.N. Docs. A/C. 6/137 and 139). On the other hand, the Soviet Union proposed the postponement of the election of the members of the Commission on the ground that "some delegations are having difficulties in putting forward nominations for the Commission". It added that "in the preparatory stage of the work of codification of international law the diversion of the energies of the leading specialists in international law and the expenditure of considerable United Nations resources connected therewith, cannot be considered justified". It recommended instead the continuance of the old Committee on the Progressive Development of International Law (U.N. Doc. A/C. 6/141).

After two days of discussion in the Sixth (Legal) Committee of the General Assembly, a subcommittee was established, made up of representatives of fourteen countries, to smooth out differences which became apparent during that discussion. After almost two months of deliberations, the subcommittee presented its report to the Sixth Committee on November 20. The Committee agreed to defer the establishment of the International Law Commission to the next session of the General Assembly. But, regardless of American insistence, it refused to endorse the subcommittee's proposal for an interim committee, and instead turned the preparatory work over to the Secretariat of the United Nations. A Soviet amendment to limit the work of the proposed Commission to the preparation of conventions was rejected. An American proposal empowering the General Assembly to "adopt" reports of the Commission was opposed by the Soviet group on the ground that it constituted an attempt to confer legislative power on the Assembly, but it was approved by a vote of 23 to 10.

On November 21, the General Assembly approved by a vote of 44 to 0, with six abstentions, the resolution for the establishment of the International Law Commission and an annexed "statute" of the Commission (U. N. Doc. A/C. 504). It referred to the new Commission the Panamanian proposal for a Declaration of Rights and Duties of States, as well as the task of formulating the principles of Nurnberg. The text of the final resolution and "statute" is:

THE GENERAL ASSEMBLY

RECOGNIZING the need for giving effect to Article 13, paragraph 1, sub-paragraph a, of the Charter, stipulating that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

HAVING STUDIED the report of the Committee directed by resolution 94 (1) of the General Assembly of 11 December 1946 to study:

(a) The methods by which the General Assembly should encourage the progressive development of international law and its eventual codification;

(b) Methods of securing the cooperation of the several organs of the United Nations to this end;

(c) Methods of enlisting the assistance of such national or international bodies as might aid in the attainment of this objective;

RECOGNIZING the desirability of establishing a commission composed of persons of recognized competence in international law and representing as a whole the chief forms of civilization and the basic legal systems of the world;

RESOLVES to establish an "International Law Commission," the members of which shall be elected at the third regular session of the General Assembly, and which shall be constituted and shall exercise its functions in accordance with the provisions of the annexed statute.

STATUTE
OF THE INTERNATIONAL LAW COMMISSION

Article 1.—1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.

2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.

CHAPTER I. ORGANIZATION OF THE INTERNATIONAL LAW COMMISSION

Article 2.—1. The Commission shall consist of fifteen members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 3.—The members of the Comission shall be elected by the General Assembly from a list of candidates nominated by the Governments of Members of the United Nations.

Article 4.—Each Member may nominate for election not more than four candidates, of whom two may be nationals of the nominating State and two nationals of other States.

Article 5.—The names of the candidates shall be submitted in writing by the Governments to the Secretary-General by the first of June of the year in which an election is held, provided that a Government may in exceptional cir-

cumstances substitute for a candidate whom it has nominated before the first of June another candidate whom it shall name not later than thirty days before the opening of the General Assembly.

Article 6.—The Secretary-General shall as soon as possible communicate to the Governments of Members the names submitted, as well as any statements of qualifications of candidates that may have been submitted by the nominating Governments.

Article 7.—The Secretary-General shall prepare the list referred to in Article 3 above, comprising in alphabetical order the names of all the candidates duly nominated, and shall submit this list to the General Assembly for the purposes of the election.

Article 8.—At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 9.—1. The fifteen candidates who obtained the greatest number of votes and not less than a majority of the votes of the Members present and voting shall be elected.

2. In the event of more than one national of the same State obtaining a sufficient number of votes for election the one who obtains the greatest number of votes shall be elected and if the votes are equally divided the elder or eldest candidate shall be elected.

Article 10.—The members of the Commission shall be elected for three years. They shall be eligible for re-election.

Article 11.—In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in Articles 2 and 8 of this Statute.

Article 12.—The Commission shall sit at the headquarters of the United Nations. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General.

Article 13.—Members of the Commission shall be paid travel expenses and shall also receive a per diem allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council.

Article 14.—The Secretary-General shall, so far as he is able, make available staff and facilities required by the Commission to fulfill its task.

CHAPTER II. FUNCTIONS OF THE INTERNATIONAL LAW COMMISSION

Article 15.—In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine.

A. *Progressive Development of International Law*

Article 16.—When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow a procedure on the following lines:

(a) The Commission shall appoint one of its members to be Rapporteur;

(b) The Commission shall formulate a plan of work;

(c) The Commission shall circulate a questionnaire to the Governments, and shall invite them to supply within a fixed period of time data and information relevant to items included in the plan of work;

(d) The Commission may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire.

(e) The Commission may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;

(f) The Commission shall consider the drafts proposed by the Rapporteur:

(g) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in sub-paragraph (c) above;

(h) The Commission shall invite the Governments to submit their comments on this document within a reasonable time;

(i) The Rapporteur and the members appointed for that purpose shall reconsider the draft taking into consideration these comments and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;

(j) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17.—1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification, and transmitted to it by the Secretary-General.

2. If in such case the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow a procedure on the following lines:

(a) The Commission shall formulate a plan of work, and study such proposals or drafts and compare them with any other proposals and drafts on the same subject;

(b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

(c) The Commission shall submit a report with its recommendations to the General Assembly. It may also, if it deems it desirable, before doing so make an interim report to the organ, agency or body which has submitted the proposal or draft;

(d) If the General Assembly should invite the Commission to proceed with its work on a proposal, the procedure outlined in Article 16 above shall apply. The questionnaire referred to in paragraph (c) of that article may not, however, be necessary.

B. *Codification of International Law*

Article 18.—1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question.

Article 19.—1. The Commission shall adopt a plan of work appropriate to each case.

2. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20.—The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

(b) Conclusions relevant to:

1. The extent of agreement on each point in the practice of States and in doctrine;

2. Divergencies and disagreements which exist, as well as arguments invoked in favor of one or another solution.

Article 21.—1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by Governments in accordance with Article 19. The Commission shall decide whether the opinions of any scientific institution or individual expert consulted by the Commission shall be included in the publication.

2. The Commission shall request Governments to submit comments on this document within a reasonable time.

Article 22.—Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23.—1. The Commission may recommend to the General Assembly:

(a) To take no action, the report having already been published;

(b) To take note of or adopt the report by resolution;

(c) To recommend the draft to Members with a view to the conclusion of a convention;

(d) To convoke a conference to conclude a convention.

2. Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Article 24.—The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

CHAPTER III. CO-OPERATION WITH OTHER BODIES

Article 25.—1. The Commission may consult, if it considers necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

2. All documents of the Commission which are circulated to Governments by the Secretary-General shall also be circulated to such organs of the United Nations as are concerned. Such organs may furnish any information or make any suggestions to the Commission.

Article 26.—1. The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.

2. For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. The Secretary-General shall endeavor to include on this list at least one national organization of each Member of the United Nations.

3. In the application of the provisions of this article, the Commission and the Secretary-General shall comply with the resolutions of the General Assembly and the other principal organs of the United Nations concerning relations with Franco Spain and shall exclude, both from consultations and from the list, organizations which shall have collaborated with the nazis and fascists.

4. The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan-American Union, is recognized.

General Assembly Requests an Advisory Opinion

The recent Resolution of the General Assembly on advisory opinions (see our December issue, page 1224) is already bearing fruit. The first request for an advisory opinion was approved by the General Assembly on November 17, by a vote of 40 to 8, with 2 abstentions. It relates to the following questions, caused by the Soviet Union's vetoes in the Security Council with respect to applications for membership in the United Nations:

"Is a Member of the United Nations, which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?"

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Review of Recent Supreme Court Decisions

SUMMARIES

LABOR LAW

Full Faith and Credit—Workmen's Compensation Awards Under Laws of Two States—*Magnolia Petroleum Co.* v. *Hunt* Distinguished

Industrial Commission of Wisconsin v. *McCartin,* 91 L. ed. Adv. Ops. 812; 67 Sup. Ct. Rep. 886; U. S. Law Week 4383 (No. 270, decided March 31, 1947).

This case varies from *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, only in that here the Workmen's Compensation award of Illinois was made pursuant to a settlement contract which expressly stated that the settlement was not to bar any rights of the employee under the Wisconsin Compensation Act. On this ground the *Magnolia* case was distinguished and the compensation award of Wisconsin held valid in an opinion by Mr. Justice MURPHY. Mr. Justice RUTLEDGE concurred in the result. T.

The case was argued by Mortimer Leviton for the Commission and by Lawrence E. Hart for the Company.

NOTE BY THE EDITOR-IN-CHIEF: Edgar Bronson Tolman, who had conducted this department since 1921, died on November 20. The reviews in this issue are from material which had been prepared by him and under his direction; he worked on them virtually to the day of his death. In some instances, his material has been substantially condensed, in order to enable the department soon to be brought current, in such form as the Board of Editors decides on for its continuance.

Reviews in this issue were written by Mr. Tolman, James L. Homire, Robert C. Watson and Richard B. Allen.

Jurisdiction of State Labor Relations Board over Matters Subject to Jurisdiction of NLRB—Supremacy of Federal Statutes

Bethlehem Steel Co. v. *N. Y. State Labor Relations Board* and *Allegheny Ludlum Steel Corp.* v. *Same,* 91 L. ed. Adv. Ops. 887; 67 Sup. Ct. Rep. 1026; 15 U. S. Law Week 4414 (Nos. 55 and 76, decided April 7, 1947).

The Court, in an opinion by Mr. Justice JACKSON, denied the right of the N. Y. State Labor Relations Board to act in a certain type of controversy because of the fact that the refusal of the NLRB to act in that field had taken on the character of a ruling that no action was appropriate.

Mr. Justice FRANKFURTER delivered a "separate" opinion in which Mr. Justice MURPHY and Mr. Justice RUTLEDGE joined. T.

The case was argued by Bruce Bromley for Bethlehem in No. 55, by John G. Buchanan for Allegheny in No. 76, and by William E. Grady, Jr., for the State Labor Relations Board in both causes.

Motor Carrier Act of 1935—Fair Labor Standards Act—Scope of Jurisdiction of Interstate Commerce Commission over Employees of Motor Carrier

Levinson v. *Spector Motor Service,* 91 L. ed. Adv. Ops. 846; 67 Sup. Ct. Rep. 931; 15 U. S. Law Week 4361 (No. 22, decided March 31, 1947).

Held, in an opinion by Mr. Justice BURTON, that, where the Interstate Commerce Commission has held that full-duty personnel of a certain class come under their jurisdiction by virtue of the Motor Carrier Act of 1935, partial-duty personnel of that same category also come under the Commission's jurisdiction and hence are excluded from the overtime provisions of the Fair Labor Standards Act.

Mr. Justice RUTLEDGE delivered a dissenting opinion in which Mr. Justice BLACK and Mr. Justice MURPHY joined. T.

The case was argued by H. L. Yale for Levinson and by Roland Rice for Spector.

Fair Labor Standards Act—"Regular Rate" of Pay When the Regular Workweek is over Forty Hours—*Walling* v. *Belo Corp.* Distinguished

149 Madison Ave. Corp. v. *Asselta,* 91 L. ed. Adv. Ops. 1062; 67 Sup. Ct. Rep. 1178; 15 U. S. Law Week 4510 (No. 479, decided May 5, 1947).

Because of unusual provisions in the contract, such as payment of "overtime" compensation for non-overtime work and payment of one and three-quarters times the contract formula rate for hours in excess of the regular contract workweek, the Court, in an opinion by the CHIEF JUSTICE, declared that the contract called for a workweek in excess of forty hours without provision for overtime pay. *Walling* v. *Belo Corp.,* 316 U. S. 624, was distinguished on these facts. T.

The case was argued by R. R. Bruce for the Corporation and by Wilbur Duberstein for Asselta.

Fair Labor Standards Act—Regular Hourly Rate—*Walling* v. *Belo Corp.* Reaffirmed

Walling v. *Halliburton Oil Well Cementing Co.,* 91 L. ed. Adv. Ops. 961; 67 Sup. Ct. Rep. 1056; 15 U. S. Law Week 4459 (No. 74, decided April 14, 1947).

The facts in this case were quite similar to those in *Walling* v. *Belo Corp.,* 316 U. S. 624. The Court, in an opinion by the CHIEF JUSTICE, reaffirmed the *Belo* decision.

Mr. Justice RUTLEDGE delivered a concurring opinion.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK concurred. T.

The case was argued by Morton Liftin for Walling and by Ben F. Saye and Paul Sandmeyer for the Company.

[EDITOR'S NOTE: *Beginning with the next case following the* JOURNAL *reviews decisions of the Supreme Court rendered during the October, 1947, term.*]

ADMINISTRATIVE LAW

Legal Basis for Order—Judicial Review—Dissenting Opinion of Mr. Justice Jackson

Securities and Exchange Commission v. *Chenery Corp.*, 92 L. ed. Adv. Ops. 1; 67 Sup. Ct. Rep. 1760, 16 U. S. Law Week 4001 (Nos. 81 and 82, dissenting opinion filed October 6, 1947).

The opinion of the Court was delivered on June 23, 1947. At that time Mr. Justice JACKSON and Mr. Justice FRANKFURTER announced their dissent and that a dissenting opinion would be filed at a later date. (See 33 A.B.A.J. 1039; October, 1947). The dissenting opinion was filed October 6, 1947.

In this opinion it is pointed out that the self-same administrative order which the Court held invalid (318 U. S. 80) is now sustained because the Commission has "recast its rationale and reached the same result". It is emphasized that there was no fraud or illegality involved either by virtue of any law, judicial precedent, or rule or regulation of the Commission with respect to the subject in controversy. The officers and directors of the corporation, while it was undergoing reorganization, purchased about seven and one-half per cent of the corporation's preferred stock. The Commission ordered them to surrender the shares to the corporation at cost, plus four per cent interest.

The dissent asserts that the order was a deprivation of the property of these individuals without compensation, and stresses that the only ground suggested in support of the order is the principle of judicial deference to administrative experience. The applicability of this principle here is strongly denied because the subject matter was one with which the Commission had not previously dealt. As stated in the words of Mr. Justice JACKSON: "The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted."

Warning is sounded as to the effect of this decision, if followed by a majority of the entire Court, in obliterating judicial review, since it supports the Commission's assertion of power to govern without law, for reasons which may remain locked in its own breast.

Concluding his opinion, Mr. Justice JACKSON says: "This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as those who are subject to authority.

"I have long urged, and still believe, that the administrative process deserves fostering in our system as an expeditious and nontechnical method of *applying law* in specialized fields. I cannot agree that it be used, and I think its continued effectiveness is endangered when it is used, as a method of *dispensing with law* in those fields."

Mr. Justice FRANKFURTER joined in this opinion. H.

The case was argued by Roger S. Foster for SEC and by Spencer Gordon for Chenery Corporation in No. 81 and by Allen S. Hubbard for Chenery Corporation in No. 82.

CONSTITUTIONAL LAW

Paramount Rights of the Federal Government in Lands Beyond the Low-Water Mark of the Pacific Ocean off California—Order and Decree in the "Tidelands Case"

U. S. v. *California*, 92 L. ed. Adv. Ops. 72; 68 Sup. Ct. Rep. 20; 16 U. S. Law Week 3139. (No. 12, Original; order and decree filed October 27, 1947).

This case was decided June 23, 1947, 67 S. Ct. 1658, 91 L. ed. 1414, (33 A.B.A.J. 1041; October, 1947), and the Court allowed the parties until September 15 to submit a form of decree to carry the opinion into effect. Two stipulations, signed by the Attorney General and Secretary of the Interior of the United States on one hand and by the Attorney General of California on the other, were subsequently filed with the Court. In these the Attorney General and the Secretary purported to renounce and disclaim for the United States paramount governmental power over certain submerged lands in the California coastal area and to authorize lessees of California to continue to occupy and exploit those lands. The agreements also purported to authorize California under conditions set out to execute leases for other submerged coastal lands.

Also in the interim period Robert E. Lee Jordan filed a petition for permission to file a motion either as *amicus curiae* or as intervenor to have the stipulations set aside on the ground that the Attorney General and Secretary of the Interior were without power to bind the United States to such an alienation.

The Court, *per curiam*, ordered the stipulations striken as irrelevant to any issue before it, denied Mr. Jordan's petition, without prejudice to the assertion of any right he may have in a proper district court, and entered the following order and decree:

> 1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.
>
> 2. The United States is entitled to the injunctive relief prayed for in the complaint.[1]

1. The relief requested was an injunction enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

3. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree.

Mr. Justice FRANKFURTER noted his understanding that insofar as the meaning or scope or validity of the stipulations may give rise to any legal issue, no such issue had been before the Court or had been there considered.

Mr. Justice JACKSON took no part in the case. A.

CONTRACTS

Liquidated Damages and Penalty Clauses in Government Contracts

Priebe & Sons, Inc. v. *U. S.*, 92 L. ed. Adv. Ops. 95; 68 Sup. Ct. Rep. 123; 16 U. S. Law Week 4023. (No. 16, decided November 17, 1947).

In a contract which Priebe & Sons made with the Government to supply dried eggs during the war there were two provisions for liquidated damages. One was operative in the event of late deliveries, and is not involved here, as the delivery was timely. The other provided that failure to have specified quantities inspected and ready for delivery by a certain date would be cause for payment of liquidated damages. Here the eggs were not inspected within the required time, but delivery was not delayed. In a suit to recover the amounts deducted under this clause, the Court of Claims held for the Government.

On certiorari the Court reversed. Mr. Justice DOUGLAS delivered the opinion. The clause for damages is held to be a penalty, unenforceable under well-settled principles of contract law into which the Court will not read an exception in favor of the Government, in the absence of a plain indication of Congressional intent to make such an exception.

Mr. Justice BLACK delivered a dissenting opinion in which Mr. Justice MURPHY concurred. Mr. Justice FRANKFURTER also delivered a dissenting opinion in which the CHIEF JUSTICE joined. H.

The case was argued by J. Arthur Miller and Allen H. Gardner for Priebe & Sons, and by Philip Elman for the U. S.

FEDERAL STATUTES

Agricultural Adjustment Act of 1938—Penalties for Sales in Excess of Quota—Interest on Penalties

Rodgers v. *United States*, 92 L. ed. Adv. Ops. 64; 68 Sup. Ct. Rep. 5; 16 U. S. Law Week 4013 (No. 58, decided November 10, 1947).

The petitioner sold cotton in excess of the quota allotted him under the Act, and the government sued to recover penalties. The sole question decided here was whether interest could be recovered on the penalties from the date due to the date of the judgment. A majority of the Court hold that interest could not be recovered. The conclusion is based upon prior rulings of the Court as to penalties not bearing interest, and while the penalty here is not imposed for commission of a crime, it is regarded as sufficiently analogous thereto to be governed by the same rule as to interest.

Mr. Justice BLACK delivered the opinion of the Court.

Mr. Justice BURTON delivered a dissent in which Mr. Justice RUTLEDGE joined.

The dissent is predicated chiefly upon the ground that the "penalty" here is not a punitive exaction for violation of law, but a charge added to presale expenses, to help keep prices and sales in line with the economic program of the government. H.

The case was argued by W. Clay Rodgers *pro se* and by Stanley M. Silverberg for the United States.

Federal Crop Insurance Act—Policy Issued as to Crop Uninsurable Under Regulations Not Enforceable

Federal Crop Insurance Corporation v. *Merrill and Merrill*, 92 L. ed. Adv. Ops. 51; 68 Sup. Ct. Rep. 1; 16 U. S. Law Week 4009 (No. 45, decided November 10, 1947).

The corporation, wholly government-owned, issued crop insurance on the Merrills' wheat crop. Because some of the acreage was reseeded on winter wheat acreage, it was uninsurable under regulations published in the *Federal Register*. Though the fact that part was reseeded winter wheat acreage was disclosed to the corporation's agent, it was not stated in the formal application which was granted. When the crop failed, the corporation refused to pay the loss, and in an action to recover the State courts ruled for the Merrills.

On certiorari the Supreme Court reversed. Mr. Justice FRANKFURTER delivered the opinion of the Court. The Court assumes that in the circumstances a private corporation would be liable on the insurance. But in the case of dealings with the Government anyone dealing with it "takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority". The regulations were published in the *Federal Register*, which gives legal notice of their contents.

Mr. Justice JACKSON delivered a dissenting opinion taking the view that the government corporation should be held to the same rule of liability as a private corporation in the circumstances. Mr. Justice DOUGLAS joined in this opinion.

Mr. Justice BLACK and Mr. Justice RUTLEDGE also dissented. H.

The case was argued by Harry I. Rand for the Corporation and by A. A. Merrill for the Merrills.

Immigration Act of 1917—Interpretation of "Entry into the United States"

Delgadillo v. *Carmichael*, 92 L. ed. Adv. Ops. 69; 68 Sup. Ct. Rep. 10; 16 U. S. Law Week 4012. (No. 63, decided November 10, 1947).

Delgadillo, a Mexican citizen, lawfully entered the United States in 1923, and remained until 1942. In that year he shipped out of Los Angeles as a seaman on an American merchant ship bound for New York. After passing through the Panama Canal, his ship was torpedoed. He was rescued, taken to Cuba and there taken care of for a week by the American Consul. In July of 1942 he was returned to the United States through Miami, Florida, and

thereafter continued to serve in the merchant fleet. In March, 1944, he was found guilty of second degree robbery in California and sentenced to prison. The district attorney instituted deportation proceedings against him under the Immigration Act of 1927, which provides that any alien convicted of a crime involving moral turpitude within five years after his "entry" shall be deported. A deportation order was entered. The accused then applied for habeas corpus, which writ the District Court allowed. The Ninth Circuit Court of Appeals reversed.

The controlling question was whether the entry of the accused in 1923 or his passage from Cuba to Florida in 1942 was "the entry of the alien to the United States" within the meaning of the Act.

In an opinion by Mr. Justice DOUGLAS, the Court reversed the Circuit Court. The opinion points to decisions which seem to hold that every entry of an alien constitutes an entry within the meaning of the Act. On the other hand, to show the conflict of decisions, Mr. Justice DOUGLAS points to *Di Pasquale* v. *Karnuth*, 158 F. (2d) 878, where an alien, while a passenger on a train from Buffalo to Detroit, crossed the Canadian border twice on the trip while he was asleep without knowledge of or intention to cross the boundary. It was there held that entries of that character were not entries under the Act.

Reviewing the circumstances of the entry by way of Florida, he says that "Here he was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port of his destination." To hold that the accused's entry from Cuba would constitute an "entry" under the Act would "impute to Congress a purpose to subject aliens 'to the sport of chance' ". T.

The case was argued by Fred Okrand for Delgadillo and by Robert W. Ginnane for Carmichael.

Federal Employers' Liability Act—Duty to Protect Employee Against Attack by Third Party

Lillie v. *Thompson, as Trustee for the St. Louis-San Francisco Railway Co.*, 92 L. ed. Adv. Ops. 115; 68 Sup. Ct. Rep. 140; 16 U. S. Law Week 4034. (No. 206, decided November 24, 1947).

The question presented here was whether, under the Federal Employers' Liability Act, a railroad company is under a duty to protect a young woman, employed by it as a telegrapher in a remote area frequented by dangerous characters, from criminal acts of third persons resulting in injuries to the employee.

Reversing the rulings of the Circuit Court of Appeals and the District Court sustaining a motion to dismiss, the Court, *per curiam*, holds that the complaint stated a cause of action against the railroad company, notwithstanding that the injury was the direct consequence of the willful and criminal act of a third person. H.

The case was argued by N. Murry Edwards and Grover N. McCormick for Lillie. There was no appearance for Thompson.

PATENTS

Lease of Patented Machine with Clause Requiring Lessee to Use Unpatented Supplies Purchased from Lessor

International Salt Co., Inc. v. *U. S.*, 92 L. ed. Adv. Ops. 55; 68 Sup. Ct. Rep. 12; 16 U. S. Law Week 4005. (No. 46, decided November 10, 1947).

The Salt Company engaged in the business of leasing patented salt-dispensing machines, the lease form containing a clause requiring the lessee to purchase from the lessor the salt employed with the machine, unless such salt could be purchased at a lower price from others. The Government brought suit for alleged violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Upon the answer and the Company's admissions of fact, the District Court granted summary judgment for the Government, the judgment providing, *inter alia*, that the defendant must, while it remains in the business of leasing salt-dispensing machines, make such leases to all applicants on equal terms. The Company appealed directly to the Supreme Court.

Mr. Justice JACKSON delivered the opinion of the Court, affirming the judgment of the District Court, and holding that to foreclose competitors from any substantial market is unreasonable *per se* within the purview of the Anti-Trust laws. The provision permitting lessees to purchase salt elsewhere at lower prices does not avoid the stifling effect of the agreement on competition.

MR. JUSTICE FRANKFURTER, joined by Mr. Justice REED and Mr. Justice BURTON, dissented from the affirmance of Paragraph VI of the judgment, which compelled the defendant to make non-discriminatory leases to all applicants. W.

The case was argued by Lemuel Skidmore for the Company and by Robert L. Stern for the United States.

PROCEDURE

Postmaster General Not Indispensable Party in Suit Against Local Postmaster To Enjoin Enforcement of Postal Fraud Order

Williams v. *Fanning*, 92 L. ed. Adv. Ops. 161; 68 Sup. Ct. Rep. 188; 16 U. S. Law Week 4044. (No. 47, decided December 8, 1947).

To resolve a conflict between circuits, the Court granted certiorari to determine whether the Postmaster General is an indispensable party in a suit to enjoin a local postmaster from carrying out a postal fraud order issued against the petitioner by the Postmaster General.

Mr. Justice DOUGLAS rendered the opinion of the Court, holding that the Postmaster General was not an indispensable party in such a case since the decree would operate on the local postmaster only and would not require the Postmaster General to take any action.

The CHIEF JUSTICE and Mr. Justice BURTON dissented. A.

The case was argued by Richard L. North for Williams and Frederick Bernays Wiener for Fanning.

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Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE Elizabeth B. A. Rogers . . ASSISTANT

Aliens . . alien, brought to U. S. involuntarily by foreign government with consent of U S., cannot be deported as "immigrant" . . immunity not limited to prisoners of war.

■ *U. S. ex rel., Paetau* v. *Watkins,* C.C.A. 2d, November 26, 1947, Clark, C. J.

Relator, the son of a German father, was born in Guatemala and lived there until after the U. S. entered World War II. Considered a German citizen, he was brought to the U. S. in 1942 and subsequently chose to go to Germany rather than remain in U. S. custody. In September, 1946, he returned to Guatemala but almost immediately was arrested and ordered deported to Germany. He was flown to the U. S. and taken into custody upon arrival. Thereafter a warrant for his deportation as an immigrant who had made an illegal entry was issued. Relator's petition for habeas corpus was refused below and he appealed. The Government asked that the ruling in *U. S. ex rel., Bradley* v. *Watkins* (33 A.B.A.J. 1046; October, 1947) and related cases be overruled or distinguished on the ground that they applied only to "prisoners of war". The Court held, however, that there was no difference between the forcible bringing of an alien into the country directly by the U. S. authorities and such action by a foreign government with the consent of the U. S. and that the U. S. had supported the action taken when they took steps against relator for his asserted illegal entry in order to insure his return to Germany.

Attorney and Client . . venue . . Federal Employer's Liability Act . . attorney who conspired with others in soliciting personal injury suits to be instituted in Illinois court, remote from place of accident, may be enjoined from appearing in such suits . . prosecution of the suits may not be enjoined except by proceedings to which claimants are parties.

■ *Atchison, Topeka & Santa Fe R.R. Co., et al.* v. *Andrews,* Ill., Superior Ct., Cook Co., November 3, 1947, Schwartz, J.

Two railroads sought to enjoin defendants from prosecuting personal injury actions filed against them in the Superior Court of Cook County. A special master found that defendants had conspired to solicit personal injury cases for one of their number, Sol Andrews, an attorney; that they had enticed key employees and hospital personnel to solicit such business; that the business was obtained with the understanding that the suits would be brought in Cook County courts; and that the institution of such actions in that county, remote from the place of the accident, subjected the railroads to inconvenience, excessive costs, and other hardships. Schwartz, J., was of the opinion that the issue of the right of the Court to reject jurisdiction of the personal injury suits was not involved in this action but considered it necessary to state his view upon the subject. Despite *Miles* v. *Illinois Central R.R. Co.,* 315 U. S. 698, and decisions of higher Illinois courts, Judge Schwartz felt that "we have the right to protect this court's good name and its misuse in such schemes as were here used." He was of the opinion, however, that whether the court should refuse jurisdiction should be decided in each personal injury case rather than wholesale in a case in which the claimants were not parties. As to the defendants' scheme, Judge Schwartz pointed out its magnitude and character by these facts: Ninety-two claims involving $5,000,000 were then pending before the Court; in a few months two defendants had invested $250,000 in advances; key employees had become "chasers" on a full or part-time basis and some had been promised $100,000 to $200,000 a year. He declared that it might have resulted in making Chicago the personal injury litigation capital of the nation. The following relief was granted: Andrews was enjoined from prosecuting the suits, further solicitations were restrained, and attorneys' liens served by Andrews in connection with the claims were declared void.

Appearances . . Under N.Y. C.P.A., defendant, by service of answer contesting court's jurisdiction over his person and property in action for divorce and alimony, submits to court's jurisdiction.

■ *Brainard* v. *Brainard,* N. Y. Supreme Ct., App. Div., 1st Dept., October 31, 1947, Dore, J.

In an action for divorce, the wife moved for alimony *pendente lite,* custody of the children, and counsel fee. The husband, who had been personally served in Massachusetts, interposed an answer in which he stated that he was appearing specially to contest the court's jurisdiction over his person and property. The court below ruled that its jurisdiction was limited to the marital *res* and denied the wife's motion. On appeal, the Court stated that defendant had submitted to the Court's jurisdiction over his person and property and reversed the order. The

reversal was based upon (a) §237 of the Civil Practice Act which provides that a voluntary general appearance of the defendant is equivalent to personal service of a summons upon him and (b) *McClure Newspaper Syndicate* v. *Times Printing Co.,* 164 App. Div. 108, in which it was held that the service of an answer raised an issue as to the court's jurisdiction and that that was equivalent, "at least so far as that issue was concerned", to a general appearance in the action.

Van Voorhis, J., dissenting, did not think the *McClure* case controlling "in view of the dual nature of an action for divorce by a wife who is also applying for alimony—the cause of action to dissolve the marriage being in rem, and the claim for alimony being in personam . . .". He pointed out that the defendant could not have moved to set aside the service of the summons since it gave the court jurisdiction over the marital *res* and he felt that defendant should not be relegated to a motion to vacate a judgment for alimony, perhaps after substantial damage had been done. In his opinion, defendant's procedure was reasonable but was rendered impracticable by the majority opinion.

Conspiracy . . overt act is not part of crime of conspiracy in sense that substitution of proof of unalleged for alleged overt act is fatal variance.

■ *U. S.* v. *Negro,* C.C.A. 2d, November 5, 1947, Frank, C. J. (Digested in 16 U. S. Law Week 2227, November 18, 1947.)

For the benefit of the lower court on a retrial, the Court considered the question whether proof of an overt act other than the one specified in the indictment would support a judgment of conviction of conspiracy. The Court thought the answer turned upon whether, under 18 USC § 88, an overt act was an element of the crime of conspiracy. It stated that, at one time, the Supreme Court seemed plainly to have held that it was not, either before or since that statute's enactment, but that it had seemed to shift its position in *Hyde* v. *U. S.,* 225 U. S. 347, in which it held that venue under the Constitution could be grounded on the fact that an overt act, innocent in and of itself, occurred within the district, although none of the defendants had there been present, and although the conspiring took place elsewhere. Frank, C. J., speaking for the Court, said: "We believe that, at least for some purposes, the overt act is not part of the crime. . . . Thus if . . . there had been no proof of any overt act other than that alleged, and if the defendant . . . had been acquitted, we think that, under the doctrine of double jeopardy, he could not subsequently have been convicted for a conspiracy on the same facts with the single exception that, in the second trial, a different overt act was alleged and proved. We think, also, that an overt act is not part of the crime in the sense that the act alleged must be proved, where another unalleged overt act is proved. . . . Consequently, we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance."

Contempt . . failure to produce records subpoenaed by Congressional committee, even in absence of evil purpose, may be willful default within meaning of statute.

■ *Fields* v. *U. S.,* U. S. Ct. App., D. C., October 27, 1947, Clark, J.

Fields was convicted of contempt under 2 USC § 192 which provides that a person who has been directed to produce papers by a Congressional committee and who willfully makes default shall be guilty of a misdemeanor. During his testimony before the committee, he had professed his willingness to produce all records in his possession and had asserted that he had done so. The lower court charged the jury that the reason or purpose of failure or refusal to comply was immaterial so long as the refusal was deliberate and intentional and not mere inadvertence or accident. Upon appeal, Fields contended that the word "willfully" as used in the statute implied a bad or evil purpose and that the instruction to the jury had been erroneous, but the Court affirmed the conviction, stating that "The apparent objective of the statute . . . would be largely defeated if . . . a person could appear before a congressional investigating committee and by professing willingness to comply with its requests for information escape the penalty for subsequent default."

Copyrights . . co-authors of copyrighted work and their respective assignees are accountable to each other for profits derived from licensing third party to use work.

■ *Jerry Vogel Music Co.* v. *Miller Music, Inc.,* N. Y. Supreme Ct., App. Div., 1st Dept., October 31, 1947, Peck, P. J.

The parties were assignees of the co-authors' interest in a copyrighted song entitled "I Love You California". Plaintiff sought to obtain one-half of the proceeds received by defendant from licensing a third party to use the song. Relying upon patent cases enunciating the accepted patent rule that co-inventors are tenants in common and that either may use the invention or license others to use it without accounting to his co-inventor, the court below refused plaintiff relief. The case was reversed upon appeal. The Court stated that, although the parties might be termed tenants in common, the term was not determinative of their rights, comparing the patent rule, *supra,* and the rule that tenants in common of real property or chattels are accountable for profits made by leasing or licensing their use to third parties.

Courts . . Federal Courts . . diversity of citizenship . . F.R.Civ.P. . . where diversity existed only between parties to original action, third party complaint dismissed when they settled their controversy.

■ *Wood* v. *Robinson,* U.S.D.C., Md., October 29, 1947, Chesnut, D. J. (Digested in 16 U. S. Law Week 2218, November 11, 1947.)

A suit had been brought against

the original defendants in the federal court, jurisdiction resting solely on diversity. Thereafter the original defendants filed a third party complaint. There was no diversity between the original and third party defendants. The original defendants then settled their controversy with the original plaintiffs and the third party defendants moved to dismiss the third party complaint. Stating that the motion presented "another novel question of procedure under Rule 14", F.R.Civ.P., Chesnut, D. J., noted that the Court's jurisdiction over the third party defendants was properly based only on its ancillary jurisdiction. He was of the opinion that the cases establishing the principle that, when jurisdiction of the court has once properly attached in diversity cases, it will not ordinarily be defeated by changes in the situation, were inapplicable to the present situation for various reasons. Pointing out that the filing of a third party complaint is a matter resting within the judge's discretion, he stated: ". . . I take the view that the discretion also equally applies with respect to the present motion . . . One of the reasons for giving leave to file the third party complaint in this case was economy of time and costs in trying all the several issues in the case at one time. But this consideration no longer exists . . . Thus there remains for disposition only the single and isolated question of contribution which can be litigated with equal convenience in the State court where alone it could have been brought . . . save for the original existence of . . . issues presented . . . before the settlement . . .".

Department of Labor . . Wage and Hour Division . . statement as to effect of Portal-to-Portal Act on Fair Labor Standards Act published.

■ Code of Federal Regulations, Ch. V, Subch. B, Pt. 790, §§790.1-790.29 (12 Fed. Reg. 7655).

The Administrator of the Wage and Hour Division, Department of Labor, published in the *Federal Register* of November 18, 1947, an extensive statement indicating his conclusions as to the effect of the Portal-to-Portal Act upon the administration and enforcement of the Fair Labor Standards Act (FLSA). The statement is of more importance than the ordinary regulations of an administrative agency in view of the provisions of §10 of the Act exculpating an employer who relies upon any "regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy" of the Administrator. The Administrator's interpretation of the Act is given in the minutest detail. The statement is divided into four parts under the headings: (1) "Provisions Relating to Certain Activities Engaged in by Employees on or after May 14, 1947"; (2) "Defense of Good Faith Reliance on Administrative Regulations, etc."; (3) "Restrictions and Limitations on Employee Suits"; (4) "Provisions Relating to Certain Activities Engaged in by Employees before May 14, 1947". In view of the exculpatory effect given by the Act to reliance upon the statement, its most important parts are obviously those which deal with activities after May 14, 1947, and the defense of reliance on such a statement in engaging in such activities. The statement first declares that the general policy of the FLSA to establish basic labor standards remains unchanged and that the Portal Act merely relieves employers of liability in certain circumstances. As to § 4 of the Portal Act, which relates to "portal-to-portal" activities engaged in by employees on or after May 14, 1947, the Act's effective date, the Director points out that "preliminary" or "postliminary" activities which take place outside the workday are not compensable merely because a contract, custom or practice makes them compensable where performed during some other portion of the day; that time, which is not time worked under the FLSA, does not become time worked because compensable by contract, custom, or practice; that time spent in travel from the place of performance of one principal activity to the place of performance of another and in travel during the employee's regular working hours is compensable without a contract, custom, or practice; that a "preliminary" or "postliminary" activity under some circumstances may be a "principal activity" under others; that "principal activities" are those an employee is "employed to perform" and that the term is to be construed liberally; that "principal activities" include those which are an integral part of a principal activity; that "compensable by an express provision" indicates that there must be both an intent by the parties to contract as to the activity and an intent to compensate its performance; and that the reference to contract, custom, or practice was a deliberate use of nontechnical words.

As to §§ 9 and 10 of the Portal Act, which allow an employer the defense of good faith conformity with *and* reliance on administrative regulations and interpretations, the Director states that actual conformity and reliance are needed; that good faith is to be determined by the "reasonable man" test; that, whereas the exculpatory regulation may be a written or oral one of any U. S. agency as to violations prior to May 14, 1947, it must be a written one of the Wage and Hour Administrator subsequent to May 14, 1947; and that, if, in answer to an inquiry, there has been a statement by the Administrator that employees are not covered by the FLSA, but he later rescinds that interpretation by a statement published in the *Federal Register*, of which the employer does not receive actual notice, there is no defense, for no interpretation exists upon which the employer could have relied.

Discovery and Inspection . . under 1946 amendment to F.R.Civ.P., relief formerly obtainable by bill of particulars cannot be obtained by motion for more definite statement.

■ *Shafir* v. *Wabash R.R. Co.*, U.S.-D.C., W. Mo., W.D., October 2, 1947, Reeves, D. J. (Digested in 16 U. S.

Law Week 2218, November 11, 1947.)

Reeves, D. J., referred to Rule 12(e), F.R.Civ.P., as amended, "which amendment" he said "is now effective" and which provides: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading." He stated that the bill of particulars was abolished and ruled, in substance, that Rule 12(e) had been amended to prevent its use as a substitute. He therefore overruled defendants' motion for a more definite statement, saying that the information sought might be obtained by a request for admissions, by interrogatories, or by a deposition.

Drugs and Druggists . . Food, Drug & Cosmetics Act . . leaflets, sent several weeks after first shipments and three weeks before last shipment of machines in interstate commerce, did not "accompany" machines and thus were not false labeling within Act . . lay witnesses may testify that their symptoms have ceased.

■ *Urbeteit* v. *U. S.*, C.C.A. 5th, November 7, 1947, Sibley, C. J. (Digested in 16 U.S. Law Week 2227, November 18, 1947.)

Urbeteit, the seller of sixteen electrical machines, appealed from a judgment of their condemnation and destruction under the Food, Drug and Cosmetics Act of 1938 (21 USC §334). The Act prohibits the introduction into interstate commerce of any drug or device that is misbranded [§301(a) (c)]; a drug or device is misbranded if its labeling is false [§502(a)]; labeling includes written matter which accompanies the drug or device [§201]. Urbeteit contended that the leaflets, which contained the allegedly false statements, did not accompany the machines. It was proven that there were four different shipments of machines, that the first three were received several weeks before any leaflets were sent, and that the last shipment was sent three weeks after the leaflets were mailed. Relying upon *Alberty* v. *U. S.*, 159 F.(2d) 278, Sibley, C. J., ruled that this was not an accompanying for "accompany means to go along with" and "in a criminal and forfeiture statute the meaning cannot be stretched". Since the leaflets contained no explanation of the operation of the machines, the Court doubted whether they would have constituted a labeling even if shipped with the machines.

Another interesting aspect of the case was Judge Sibley's ruling that the lower court had erred in excluding the testimony of thirty patients of Urbeteit. The exclusion had been on the ground that they were not competent to diagnose their ailments and thus say from what they were relieved, but Judge Sibley ruled that they knew whether their external symptoms and pains had ceased.

Same. . same. . test of "accompany" under Act is not physical continguity but textual relationship.

■ *U. S.* v. *Kordel*, C.C.A. 7th, November 6, 1947, Sparks, C. J. (Digested in 16 U.S. Law Week 2228, November 18, 1947.)

Kordel, a self-styled authority on nutrition and vitamins, appealed from his criminal conviction under the Food, Drug, and Cosmetics Act. (For the Act's provisions, see the *Urbeteit* case, *supra.*) He argued that the literature containing the false statements had not "accompanied" his products in interstate commerce; that, although in some cases the literature was placed in the carton with the products, more often it was shipped separately and, in one case, a year and a half intervened between the shipment of the products and the drugs; and that the fact that the literature contained either a price mark or a mailing permit with space for address showed that it was intended for advertising purposes, not labeling. The Court answered that the literature might serve both purposes, that the placing of a mailing permit or price tag, "a very easy subterfuge", could not insulate a shipper from liability under the Act, and that the test was not physical continguity but textual relationship. In the light of this test and of the fact that the labels on the immediate containers gave no indication of the products' uses, it held that the products and the literature were interdependent. As to Kordel's contention that the Act should be strictly construed and that prior holdings, to the effect that literature need not be shipped in the same containers or simultaneously to "accompany" the products, should be distinguished since the proceedings were criminal, the Court replied that the distinction was inapplicable and, as the Act was intended to protect public health, its construction should be liberal. It stated that it disagreed with the reasoning of *Alberty* v. *U. S.* (see the *Urbeteit* case, *supra*).

Elections . . veteran students who maintain family domicile are eligible to vote in district where residing despite constitutional-statutory edict that voting residence shall not be gained or lost by presence or absence while student at seminary of learning.

■ *In re Robbins*, N. Y. Ct. App., October 30, 1947, Desmond, J.

The Inspectors of Elections refused to register the petitioners as voters. They were students, their wives and relatives. They resided in a housing development which had been leased to Columbia University by the Federal Public Housing Administrator for occupancy by students only and by only such students as were veterans; each apartment was occupied as a separate family domicile; each male petitioner was the head of a family and many were gainfully employed; the development was miles from the educational institutions attended by the students. Upon application, the Supreme Court, Special Term, ordered the registration of the "non-student" petitioners but refused such an order as to the "student" petitioners. This order was affirmed by the Appellate Division of the Supreme Court. Upon appeal, Desmond, J., stated that "no case (except the present ones)

goes so far as to hold that a married student, moving with his wife from their former residence to one nearer his studies, automatically loses his right to vote by force of the [State Constitution] and [Election Law] edict" which provides that no person shall be deemed to have gained or lost a residence "by reason of his presence or absence . . . while a student of any seminary of learning." He said that the provisions "decreed that those who attend colleges and seminaries away from their family homes and live in college residential halls during the college *in the fashion conventional before the war,* do not, thereby, and without more, become qualified to vote, since they had so limited a part and interest in the community," but that "that old concept of semi-cloistered college life has little to do with the way these petitioners are getting their education". The living arrangements of the petitioners were compared with "new-fashioned company-owned housing projects". Although it was recognized by Judge Desmond that their tenure of occupancy in the housing development would continue only while they were students, it was said that "since they have no other homes, their tenure is 'temporary' or 'indefinite' only in the same sense as the tenure of the occupant of a city apartment house". The orders were modified so as to grant the petitions of the student petitioners. Two judges concurred with Judge Desmond, three concurred in the result and one took no part.

Labor Law . . Labor-Management Relations Act . . Board's order seeking to correct employer's past conduct of discouraging union organization in manner violative of new Act is enforceable despite Act's permitting some of the acts on which findings were based. . portion of order seeking to prevent conduct now lawful is not enforceable . . discharge for business reason not "for cause" if no lawful basis for selection of dischargee.

■ *NLRB* v. *Sandy Hill Iron & Brass Works,* C.C.A. 2d, November 5, 1947, Chase, C. J. (Digested in 16 U. S. Law Week 2230, November 18, 1947.)

The NLRB sought enforcement of an order issued against the company on July 11, 1946. The order was designed to correct the unfair labor practices of which the company had been found guilty in the past and to prevent their recurrence in the future. The company contended, inter alia, that the order could not be enforced under the Labor-Management Act. Insofar as the company was found to have violated the Wagner Act by attempting to discourage union organization through threats, promises and discriminatory discharges, the Court held that its conduct was violative of the new Act and that correction of these unfair labor practices was proper. The fact that the new Act permitted some of the Acts on which the findings were based was held to be immaterial since the statute was remedial, not punitive. To the extent that the order prevented future conduct which was lawful under the new Act, however, it was held to be unenforceable. The company contended that, since the Board had found that it had a sufficient economic reason to discharge employees, the discharges were "for cause" within §10(c) of the new Act and the order was invalid as to the reinstatement of any of the discharges. The Court held that, since the Board had found that the company had selected for discharge a greater proportion of union members

Statutes . . construction . . effective date of 1946 amendments to F.R.Civ.P. . . resolution under which Congress does not adjourn *sine die* does not "close" session . . hence such amendments were not in effect where nothing else had occurred to close session . . effective reconvening under presidential proclamation not passed upon.

■ *Ashley* v. *Keith Oil Corp.,* U.S.-D.C., Mass., November 18, 1947, Wyzanski, D. J. (Digested in 16 U. S. Law Week 2240, November 25, 1947.)

Judge Wyzanski held that the period within which an appeal could be taken from the District Court was still three months in spite of the 1946 amendment to F.R.Civ.P., Rule 73, fixing the period as thirty days. He reached the conclusion that the amendment was not in effect by holding that there had been no "close" of the session within the meaning of 28 USC §723 (c) which provides that the rules "shall not take effect until they shall have been reported to Congress . . . at the beginning of a regular session thereof and until after the close of such session." He stated that Concurrent Resolution No. 33 providing that Congress should adjourn from July 27, 1947, until January 2, 1948, unless notified to reassemble, did not close the session *sine die* as of July 27, 1947., and that the session had not been closed by a new session beginning under an Act of Congress or the Twentieth Amendment, Section 2, to the Constitution. Judge Wyzanski did not determine whether the reconvention of Congress on November 17, 1947, pursuant to the President's proclamation of October 23, 1947, brought the session to a close since, if so, the amendments by their own terms would not become effective until "three months subsequent to the adjournment" or February 17, 1948.

[*Shafir* v. *Wabash R. R. Co.* (U.S.-D.C., W. Mo., W.D., October 2, 1947, digested on page 62 of this issue) cited by Judge Wyzanski as seeming contrary to his reasoning should not be so regarded since the effectiveness of the amendment was there assumed without discussion in spite of the fact that the three months period was still unexpired even if Congress had been deemed to have adjourned on July 27.]

Further Proceedings in Cases Previously Reported.

The following action has been taken by the U. S. Supreme Court:

Certiorari Granted: *Sipuel* v. *Board of Regents of University of Oklahoma*—Constitutional Law (33 A.B.A.J. 722; July, 1947).

Certiorari Denied: *Barkman* v. *Sanford*—Criminal Law (33 A.B.A.J. 935; September, 1947); *California Apparel Creators* v. *Wieder of California. Inc.*—Unfair Competition (33 A.B.A.J. 1051; October, 1947).

Practising lawyer's guide to the current LAW MAGAZINES

ATTORNEYS—*"Certification—A Proposal to the Bar":* Albert I. Kegan, lecturer on patents and copyrights at the Northwestern University School of Law, and Louis G. Melchior, of the Illinois Bar, collaborated on an article in the September-October issue of the *Illinois Law Review* (Vol. XLII—No. 4; pages 413-423) in advocacy of a system for the certification of attorneys as specialists through written examination conducted by leaders in each important specialty in the law, to be followed by a listing of them according to specialty in classified public directories. The authors' view is that the adoption of such a plan would tend to combat the unauthorized practice of law, since machinery would thereby be provided "to make it easy for every client to find a lawyer competent to handle the client's particular problem." The authors recognize that "details" of their proposed system for certification will evoke controversy. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: $1.00).

COMPARATIVE LAW—*Roman Law in Law School Curricula—Articles as Memorial to Professor William Warwick Buckland:* Although problems of Roman law may be of remote concern to the average practicing lawyer in America outside the State of Louisiana, the October issue of the *Tulane Law Review* (Vol. XXII—No. 1; pages 1-194) is worthy of note because it is devoted to a series of significant articles assembled in memory of Professor William Warwick Buckland, of Cambridge University, who died in 1946 after having achieved a position as one of the foremost Romanists of the world. In recent years the course in Roman law, which for comparative purposes was once considered basic in the curricula of the leading law schools in the United States, has been minimized. Nevertheless, Professor Buckland did lecture at one time or another at important centers of legal education in America and demonstrated through his lectures both the analytical and the historical relation of Roman law to Anglo-Saxon common law. The contribution by Professor P. W. Duff, of Cambridge University, on the position of Roman law in the curricula of universities throughout the world today, is of special interest. Other articles take up specific doctrines of Roman law as they have been related to the development of trends in the public and private law of England and America. (Address: Tulane Law Review, New Orleans, La.; price for a single copy: $1.00).

CONSTITUTIONAL LAW—*"Political Subversives: An Appraisal of Recent Experience and Forecast of Things to Come":* A worthwhile contribution under the above-quoted title is in the December issue of *The Record* of the Association of the Bar of the City of New York (Vol. 2—No. 9; pages 350-361). The author is Edwin D. Dickinson, Dean of the School of Jurisprudence of the University of California, lately a Special Assistant to the Attorney General. With manifest dislike for the Communist party and its name-calling co-workers, he offers a remedial program which he regards as consistent with constitutional processes and abiding "faith in free institutions". (Address: The Record, 42 West 44th Street, New York 18, N. Y.; price for a single copy not stated).

CORPORATIONS—*"Some Practical Aspects of a Merger":* In the September issue of the *Harvard Law Review* (Vol. LX—No. 7; pages 1092-1118), James J. Fuld points out the legal difficulties that may make impracticable an otherwise attractive proposed merger or consolidation. While he does not resolve, or even discuss fully, all of the questions confronted in a merger or consolidation, the article should prove of substantial worth to the average lawyer faced with merger problems. The practical questions, from appraisal and preservation of corporate and trade names to tax and accounting consequences, which have to be studied and answered before competent advice can be given a client, are pointed out. (Address: Harvard Law Review, Cambridge, Mass.; price for a single copy: $1.00).

CORPORATIONS—*"British Corporate Law Reform":* The "comment" department of the September issue of the *Yale Law Journal* (Vol. 56—No. 8; pages 1383-1403) carries an informative summary of the "Report of the Committee on Company Law Amendment" made by a governmental committee in Great Britain, as to the extent to which the basic statutory provisions governing British corporations should be changed. The summary compares the recommendations for reform in the British statute with various requirements of the federal statutes of

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

this country which control activities of corporations. It is interesting to note that while the core of our Securities Act of 1933 was believed to have been derived from the British Companies Act of 1929, the recent report on the English statutes, in a number of aspects, is designed to show the necessity for enlarging the control of corporations in that country along the lines of American regulation. Of special interest to American lawyers will be the comparison of the suggested control of proxy solicitations with that which already exists in this country. (Address: Yale Law Journal, 401A Yale Station, New Haven, Conn.; price for a single copy: $1.00).

EVIDENCE—*"The Admissibility of Confessions in Criminal Cases":* The *Canadian Bar Review* in its October issue (Vol. XXV—No. 8; pages 823-853) gives a study of the genesis and development of the rule on the admissibility of confessions in Canadian criminal cases. Under that rule a voluntary confession by an accused may be used against him but a confession is deemed not to be voluntary if it is made after suspicion has attached to him or a charge has been preferred against him and as a result of an inducement by way of a promise or a threat relating to the charge by or with the sanction of a person in authority. The analysis of leading English and Canadian decisions on the subject was prepared for submission to the Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada. The article recommends that the rule as to the admissibility of confessions be codified in a manner which would permit the Court to determine, under the circumstances of each case, not only the immediate probative value of the confession, but also the question whether proper police methods were used in obtaining the confession. (Address: Canadian Bar Association, Ottawa Electric Building, Ottawa, Ont.; price for a single copy: 75 cents).

FEDERAL COURTS—*"Reappraisal of Federal Question Jurisdiction":* In the November issue of the *Michigan Law Review* (Vol. 46—No. 1; pages 17-46) G. Merle Bergman, Associate of the Research Committee on International Federation, at the University of Oklahoma, discusses "federal question" jurisdiction against the background of the early decision of Chief Justice Marshall in *Osborn* v. *Bank of United States,* 22 U. S. 738, and the Act of 1875 conferring original jurisdiction upon the federal Courts (as distinguished from that conferred by removal statutes) in "federal question" cases. It is Mr. Bergman's view that the language used in modern cases to define "federal question" jurisdiction derives essentially from the decision in the *Osborn* case and Section 5 of the Act of 1875, and that such modifications as have appeared in later judicial pronouncements of the Supreme Court of the United States are but minor variations to accord with current notions of trial convenience. (Address: Michigan Law Review, Ann Arbor, Mich.; price for a single copy: $1.00).

LABOR LAW—*"The Labor-Management Relations Act of 1947":* The Taft-Hartley Act has already been subjected to scrutiny and analysis by scholars as well as controversialists in the field of labor relations law. A further contribution is the instructive and stimulating 60-page analysis and comment by students of Northwestern School of Law in the September-October issue of the *Illinois Law Review* (Vol. XLII—No. 4; pages 444-504). Because of the Act's broad scope, the comment is limited to the following topics: The changed employer-employee-union relationship, the "free speech" provision, secondary boycotts, "feather-bedding," picketing, aspects of judicial review under Section 10, the "Communist" provision, union registration requirements, suits against labor unions, and the effect on State labor laws.

Each topic is generally developed from the viewpoint of (1) a comparison of the new and the superseded law; (2) where applicable, an examination of the new provision in relation to the previously established rule or decision of the NLRB which the Act was intended to change or eliminate; and (3) an evaluation of the new provision in the light of the basic policy of the Congress in enacting the Taft-Hartley Act. With its pertinent and carefully selected references the discussion should prove helpful to practitioners and students who seek a clearer understanding of the Act and of the issues raised by those provisions which lend themselves to conflicting interpretations. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: $1.00).

LABOR LAW—*"Union Unfair Labor Practices under the Taft-Hartley Act":* Current discussion of the Taft-Hartley Act is often of a generalized character. Or the new Act is dealt with section by section, with comment to show how the new provisions are similar to or different from provisions of the Wagner Act. The felt need for close study of the Act's provisions as they relate to particular topics or situations doubtless led to the article in the November issue of the *Virginia Law Review* (Vol. 33—No. 6; pages 697-729) by James F. Foley, who usefully analyzes the Act in relation to unfair labor practices by unions.

He treats of the six unfair labor union practices proscribed by Section 8 (b) of the Act and the procedures for their prevention. These practices fall within two categories: (1) Those which apply to unions and their agents the restraints which formerly were, and still are, applicable to employers; and (2) unfair union practices primarily affecting employers. Inasmuch as direct precedent is lacking in passing on unfair union practices against employees, the author analyzes the applicable provisions and speculates as to what the NLRB seems to him likely to do in administering them on the basis

of the Court and NLRB decisions in cases against employers having analogous application. The provisions take on new meaning and definiteness when viewed in the light of how the NLRB and Courts applied similar provisions involving unfair labor practices by employers.

As to the union unfair practices against employers, the author explains the scope and applicability of these provisions in the light of the abuses which grew and multiplied because of the inability of the federal Courts to enjoin them, by reason of the Norris-La Guardia Act passed in 1932. This historic background helps to clarify the purpose and objective of the new provisions, and is helpful to an understanding of the limited extent to which judicial power to enjoin acts of labor which are unfair practices has been restored to the federal Courts. (Address: Virginia Law Review, Charlottesville, Va.; price for a single copy: $1.00).

LEGAL EDUCATION—*"A Plea for Lawyer-Schools", "The Law School of the Future":* The two main articles in the September issue of the *Yale Law Journal* (Vol. 56—No. 8; pages 1303-1355) are devoted to a reappraisal of the objectives of legal education. The first article (pages 1305-1344), by Judge Jerome Frank, of the U. S. Circuit Court of Appeals for the Second Circuit, is a reiteration of a thesis which he has effectively expounded in the past; viz., that the center of our legal system is the trial Court, which is largely ignored in leading law schools of the country. He proposes a reorganization of legal education to provide that a greater proportion of the teachers in each law school be persons with actual experience as lawyers, that the case system be revised to involve the study of actual trials in Courts, and that an effort be made to develop full-fledged law school clinics patterned after the clinics attached to medical schools.

The second article, by Professor Myres S. McDougal, of the Yale Law School, attempts a compressed summary of what he conceives to be the transition of the Yale Law School from leadership in "legal realism" to pioneering in "policy science." The gist of it seems to be that what he regards as destructive "legal realism" is insufficient to meet the needs of an atomic age in which a world community affords the only hope of survival. It is for the reader to decide whether the author demonstrates, by references merely to the catalogue of courses offered at Yale during the summer of 1947, that a new approach has been clearly defined or effectively espoused at that institution. The subject-matter and significance of these two articles are discussed in connection with the Yale Law Faculty's "Manifesto" of November 26, elsewhere in this issue. (Address: Yale Law Journal, 401A Yale Station, New Haven, Conn.; price for a single copy: $1.00).

MUNICIPAL CORPORATIONS—*"The Legality of Parking Meter Ordinances and Permissible Use of Parking Meter Funds":* In a thoroughly annotated article on a little-discussed subject, Marion Allen Grimes, in the June number of the *California Law Review* (Vol. 35—No. 2; pages 235-251), analyzes four grounds on which the legality of such ordinances are challenged in the Courts: (1) Lack of the requisite delegated authority; (2) unreasonable use of a delegated police order; (3) unreasonable interference with the rights of abutting property owners; and (4) imposition of an unauthorized revenue tax under the guise of a properly delegated police power. Although the discussion is devoted chiefly to the legality of parking meters in California, it may in particular cases be found helpful to lawyers in other States. (Address: California Law Review, Berkeley 4; Calif.; price for a single copy: $1.25).

PRACTICE AND PROCEDURE—*"Immunity and Sentimentality":* The article in the June number of the *Cornell Law Quarterly* (Vol. XXXII—No. 4; pages 471-489) offers a critical analysis of the prevailing decisional law granting to non-resident litigants immunity from third-party suits. The authors, Professor Arthur John Keeffe, of the Cornell Law School, and John J. Roscia, of the Board of Editors of the *Quarterly,* question the soundness of the various arguments which have regularly been advanced by the Courts in justification of such immunity. They take the position that such immunity has largely been predicated upon sentimentality and anachronistic concepts; so they urge a reconsideration of the problem in its several aspects, with a proper regard for the common law right of third parties to sue their debtors wherever they may find them. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

TAXATION—*Federal Income Taxes—"Loss Carry-overs Under the Internal Revenue Law":* J. K. Lasser, a certified public accountant, contributes to the September issue of the *Cornell Law Quarterly* (Vol. XXXIII—No. 1; pages 50-72) an article which could well serve to convince any remaining skeptics of the essential complexity of the federal income tax laws. Dealing basically with the mathematics of "net loss carry-overs" and "net loss carry-backs", it is confessedly an accountant's technical exposition of the steps involved in the computation of the carry-over. Although it is not easy reading, it should be helpful to lawyers who have problems in this field. As in other types of cases, however, accounting calculations are to be regarded as an aid to and not as a substitute for legal analysis of the problems involved. The possible adverse or beneficial consequences of a net loss to the business man who has sustained one are so substantial as to justify Mr. Lasser's blunt conclusion that "business men had better understand the technical mechanics of the carry-back." Particularly is this true in a day when "losses may often be more profitable than profits and are half the bother." (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

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OUR YOUNGER LAWYERS

Charles H. Burton, Secretary and Editor-in-Charge, Washington, D. C.

■ Junior Bar Conference Chairman T. Julian Skinner, Jr., of Jasper, Alabama, has completed his appointments for 1947-48 and the Conference is geared for its active program. Although Committees and activities follow the general line of 1946-47, changes have been made. The work of the Committee to Aid the Small Litigant has been divided among three standing Committees: Committee to Study the Justice of the Peace and Minor Courts, Committee on Small Loan Studies, and a new Committee to Aid the Small Litigant. The work of the latter will be directed to legal aid and studies of public defender problems.

A new Committee on Cooperation with Junior Bar Groups has been set up, and a special Committee on the Annual Meeting. The Committee on Awards of Merit, which was formerly a special Council Committee, has been established as a regular Committee of the Conference.

Younger lawyers of Conference age who wish to work on or with any of the above Committees are asked to write promptly to the appropriate Chairman.

Ella C. Thomas, of the Conference Committee on the Inter-American Bar, was Conference representative at the recent meeting of the Inter-American Bar Association in Lima, Peru.

The second Jackson Law Institute was held on December 5 and 6 at the Heidelberg Hotel in Jackson, Mississippi. The high point of the Institute was the dinner meeting which was addressed by Jacob M. Lashly, of Missouri, Past President of the American Bar Association and now Chairman of the Association's Special Committee on Aid to Lawyer's in War-Devastated Countries. Junior Bar Conference National Vice Chairman, Walter B. Keaton, of Indiana, also spoke at the meeting. The sessions of the well-planned Institute included discussions on labor law and oil and gas law. Francis Bowling, President of the Jackson Junior Bar Association, Past President Bernard W. Chill and Warren V. Ludland, Jr., spearheaded plans for this excellent forum.

WALTER B. KEATON
Vice Chairman, Junior Bar Conference

The Award of Merit for general excellence in Bar association activities on a Statewide basis was made to the Massachusetts group by Junior Bar Conference National Secretary Charles H. Burton, at a luncheon meeting of the Bench and Bar held at the Parker House in Boston on December 13. Lawrence E. Corcoran, Conference State Director for Massachusetts, received the award on behalf of the group.

Letters to the Editors

Indiana Has Not Lowered Standards for Admissions

To the Editors:

Mr. Gerhart's article relative to admissions to the Bar (33 A.B.A.J. 995; October, 1947) has been read with interest, and I observed that Indiana is shown to have lowered or eliminated examination requirements regarding veterans. This was a matter of surprise to me because I do not know of any such lowering or elimination of examination requirements with the possible exception of the provisions of Rule 3-14a of the rules of the Supreme Court of Indiana, 1943 revision, which Rule 3-14a was ordered by the Supreme Court of Indiana on June 17, 1943, became effective on and after September 6, 1943, and was eliminated upon the adoption of the 1946 revision of the rules. Such rule was in the words and figures following:

> Rule 3-14a. Admissions During War. During the period of the war in which the United States is now engaged, students of accredited law schools, as described in these rules, who have or shall become members of, or who have been or shall be ordered to report for duty in, the military or naval forces of the United States before having an opportunity to take the bar examination next following their graduation, shall be admitted by this court without examination by the Board of Law Examiners, upon certificate of the dean of the law school that such student has met the requirements for graduation by that school. The admission will be subject to all other requirements of these rules.

In no event do I desire to cause any controversy relative to the listing of the State of Indiana as a state which has lowered or eliminated examination requirements, but it does

not appear to me to be too fair to consider the above mentioned rule which for a short time favored some graduates of accredited law schools who were entering the military service as a general lowering or elimination of examination requirements—which Mr. Gerhart's chart infers.

JOHN M. MCFADDIN
President of the State Board of Law Examiners for the State of Indiana
Indianapolis, Indiana

EDITOR'S NOTE: We reciprocate the equable spirit in which President McFaddin has written, with no desire for controversy. The Supreme Court of Indiana and the State Board of Law Examiners have consistently held to the course that all of the usual requirements for admission to the Bar be maintained, irrespective of whether the applicant is a veteran or non-veteran, *except* in so far as a hardship situation was temporarily relieved by the adoption of Rule 3-14a. This rule, which was in force from September of 1943 until the adoption of the 1946 revision of the rules, favored certain graduates of accredited law schools who were entering military service, not discharged veterans. Mr. Gerhart's chart indicated Indiana as one of the States which had varied in some respects its usual requirements. In clarification of the generalization rather than as a correction of the chart, we are pleased to publish President McFaddin's letter.

W. L. R.

New Jersey's Requirements for Admission to Practice

To the Editors:

Your recent articles on the requirements for admission to the Bar (33 A.B.A.J. 904, September, 1947; and 33 A.B.A.J. 995, October, 1947) have attracted attention to requirements for admission which relate neither to character nor fitness but tend to protect established practitioners from competition New Jersey has gone far to discourage young lawyers from remaining in the State and to exclude qualified practitioners from coming here.

For example, New Jersey admits no foreign attorney on motion, and exacts a registration and one-year clerkship from resident graduates of law schools before they may take the "attorney's" examination, limiting the number of clerks in any one office. It also demands three years of practice and residence in the State before anyone may take the "counselor's examination" in order to practice before the highest Court.

The members of this Association may decide whether such requirements are fair to a young lawyer who seeks the best opportunity to practice his profession, or for the people of New Jersey, who follow the American system of free competition as it exists outside the practice of the law.

ROBERT MCK. GIBSON

Montclair, New Jersey

Bar Association News

Richard B. Allen • Editor-in-Charge

Washington State Bar Approves Jennings Bill

■ The Washington State Bar Association, at its 1947 annual meeting on August 29 and 30, voted its approval of the Jennings bill (H.R. 1639), which restricts the venue of actions against railroad companies for personal injuries sustained by employees to the place where the injury occurred or to the place of the plaintiff's residence.

The American Bar Association plan and its variants for improving the methods of selecting State Court judges (see editorial: 33 A.B.A.J. 1169; December, 1947), was discussed in the light of experience in Missouri, California and other States. Preliminary plans for the American Bar Association's Annual Meeting, to be held in Seattle in 1948, were talked over and initiated.

The annual meeting of the Superior Court Judges Association was held, with some of the sessions conducted jointly with those of the State Bar.

The Association approved and adopted resolutions:

(1) Directing the officers and staff of the Bar Association to give to all members of the Association all possible information as to proposed and pending legislation in the State legislature in which the Association is interested;

(2) Recommending the passage of a State Juvenile Court Act, but reserving to the Superior Courts the right to appoint probation officers;

(3) Recommending the revision of the forms of published legal notices, in order to eliminate superfluous words;

(4) Endorsing the bill introduced in the United States Senate by Senator Magnuson, to provide for the compensation of attorneys appointed by the federal Courts to represent indigent defendants in criminal cases;

(5) Commending the federal government's efforts to develop a stable and vigorous foreign policy, and urging firm measures to stop any spread of Communism; and

(6) Refusing to fix an arbitrary age for the retirement of judges, and urging adequate support of the judicial retirement fund, to the end that the fund be always fully solvent.

Matters considered, but not acted upon, were as to whether non-observance of a minimum fee schedule by a local Bar Association can be covered by an effective rule, the

RICHARD S. MUNTER, President
Washington State Bar Association

activities of the Association's Committee on the Unauthorized Practice of Law, a possible revision of the procedure in the Justice of the Peace Courts, suggested changes in divorce laws, the laws relating to insane persons, and the lawyer reference plan.

Guests of honor at the 1947 meeting were members of the State Supreme Court; Major General Thomas H. Green, Judge Advocate General of the Army; Honorable John Wallace de Beque Farris, K. C., of Vancouver, B. C.; Jack Foster, Editor of the *Rocky Mountain News*, of Denver, Colorado; Honorable A. Reg. MacDougall, of Vancouver, B. C.; John A. Kellogg, of Bellingham; Reno Odlin, of Tacoma; and Arthur H. Howard, Mayor of Bellingham.

Announcement was made of the election of Richard S. Munter, of Spokane, as President of the State Bar Association for 1947-48, to succeed A. J. O'Connor, of Wenatche. Other officers are: Edward R. Taylor, of Seattle, Secretary-Treasurer; and Clarence J. Coleman, of Everett; Thomas L. O'Leary, of Olympia; John Gavin, of Yakima, Harold W. Coffin of Spokane and Cyrus Happy, of Tacoma, members of the Board of Governors.

Committee of Maryland Bar Reports as to Local Practice Restrictions

■ At the 1947 annual meeting of the Maryland State Bar Association, a Committee appointed by Judge Ogle Marbury, its President, and headed by J. Cookman Boyd, Jr., as Chairman, made a report concerning local rules of Court in that State which restrict or affect the right of admitted attorneys to practice law in the particular counties. No action upon the report was taken at the 1947 meeting.

The Committee found and stated that so far as is known, rules of the type under consideration are in effect in Maryland in but five counties—Montgomery, Frederick, Anne Arundel, Howard and Carroll. The rules in Montgomery and Frederick counties were said to be identical, and the rules in Anne Arundel, Howard and Carroll counties to be identical. The rule in Montgomery County, adopted August 25, 1943, was in apparent pursuance of the authority granted by Chapter 1004 of the Acts of 1943, which gave to the Circuit Court for Montgomery County the power to make rules of Court relating to practice, and relating to the admission of attorneys to practice, before that Court. Further authority was given to the Court to license attorneys to practice before it and to fix a fee for the issuance of the license in an amount not less than $25 nor more than $250, the fees so paid to be "dispersed" by the Clerk, under the direction of the judges, for the purchase of law books for the Court library.

In the rule adopted by the Montgomery County Court, effective October 1, 1943, it is provided in substance that all proceedings not brought and carried on in proper person shall be brought and conducted by an enrolled member of the Bar of the Circuit Court for Montgomery County. The rule further provides that an attorney in good standing at the Bar of the Court of Appeals and who regularly maintains in Montgomery County a bona fide office for the practice of law (a bona fide office being defined as the place where a member of the Bar spends a reasonable part of his working day in the practice of law) shall be eligible to become an enrolled member of that Bar upon application in writing, under oath, and upon approval he shall sign the test book maintained for that purpose. The enrollment remains in effect as long as the attorney continues to comply with the requirements of this rule and further orders of the Court. The rule makes no mention of any license fee, as authorized by the Act, nor apparently is any formal license issued.

The Committee was advised that a rule identical to that in effect in Montgomery County prevails in Frederick County, apparently in pursuance of Chapter 1079, Acts of 1945, which authorizes and empowers the Circuit Court for Frederick County "to make rules of Court relating to practice before said Court," and provides further that "no person shall practice law in Frederick County or appear before any Court in Frederick County until he or she shall have first complied with the rules of practice established by the Circuit Court of Frederick County."

The rule in effect in Anne Arundel, Howard and Carroll counties, while somewhat similar to those in Montgomery and Frederick, was put into effect in or about 1936 and does not purport to rest for its authority upon any special act of the legislature. This rule provides that all actions not brought or carried on *in propria persona* shall be brought and conducted by an enrolled member of the Bar of the particular county Court, but provides that this rule shall not preclude an attorney in good standing at the Court of Appeals or of any other Bar from becoming and being associated with an attorney of the county Bar in the institution and trial of any action, and the rule further provides that it shall not prevent the Court from making an exception in its operation whenever the occasion warrants.

The report of the Committee reviewed carefully the Maryland statutes and decisions, and concluded that "in Maryland, it would seem that the exclusive power *to admit* applicants to the Bar has been validly vested by the legislature in the

Court of Appeals." (*In re Maddox*, 93 Md. 727). The committee examined the conflicting Ohio and Pennsylvania decisions of *Meyer et al.* v. *Briusky et al.*, 129 Ohio St. 37 (1935), and *Olmsted's Case*, 292 Pa. 96 (1928), and stated its own conclusions and recommendations as follows:

1. That in Maryland an attorney admitted to practice by the Court of Appeals has the right to practice in each of the State Courts, anywhere in the State.

2. That any rule of Court the effect of which would be to place upon any attorney the necessity of taking any additional material action which in substance would impede his right to appear in such Court and to practice his profession would be invalid.

3. That Courts possess an inherent power—furthered in Maryland by the provisions of the general statute, Article 26, Section 1—to make all reasonable rules and regulations for the well-governing and regulating of their respective Courts and of the officers thereof.

4. To the extent that non-resident counsel be required to appoint some responsible person of local address upon whom all papers and notices may be served with binding effect (absent the adoption of the Proposed Rule 3, of the Standing Committee, supra), it cannot be said that a rule inspired, designed and practiced for the sole purpose of expediting the efficient procedural and administrative purposes of the Court violates any right or hinders any attorney in the due practice of his profession.

5. That, with respect to Chapter 1004 of the Acts of 1943, the attempt thereby to grant authority to the Circuit Court of Montgomery County to issue a license to practice law, and to charge a fee therefor is invalid.

6. The Committee believes uniformity to be at least as desirable now as our legislature found it in 1831, and hence, if possible, that there should be in effect but one rule, by which all attorneys throughout the State could know in advance the requirements for practice in jurisdictions where they do not have offices. Yet, the rules under consideration here are in effect in only five jurisdictions, constituting two judicial circuits, whereas, nineteen jurisdictions, or the remaining six circuits, have not as yet found such rules necessary.

It may well be, however, that these latter jurisdictions have this problem in some degree, and would therefore accept with favor a rule uniform throughout the State so long as it did no violence to the right to practice, once conferred. And similarly, the five counties having rules at present would not be expected to object to a uniform rule, if efficacious as a solution to their local problems. To this end, the Standing Committee of the Court of Appeals, with its broad membership, and its long experience in the consideration of State-wide problems, would seem aptly constituted to undertake the formulation of such a rule, for presentation to the bench and Bar of the State; and this Committee recommends that a resolution be adopted by this Association, referring this report to that Committee, for its consideration, and such action as it may find appropriate.

New York City Association Will Help as to Tax Status of Lawyers

■ At the stated regular meeting of the Association of the Bar of the City of New York on December 9, Former Judge Samuel I. Rosenman, as Chairman of the Special Committee on Public and Bar Relations, reported that his Committee will cooperate actively with the American Bar Association on proposals to assist professional men who are partners to participate in pension or retirement plans through appropriate amendments of the Federal Income Tax Law or otherwise. He stated the gist of the JOURNAL's recent editorial on the subject (33 A.B.A.J. 1118; November, 1947).

For the assurance of members of the Bar who are keenly interested in the subject, the JOURNAL states that committees to deal remedially with it have been created in each the Section of Taxation and the Section of Corporation, Banking and Mercantile Law, which have been studying the subject separately (33 A.B.A.J. 1001 and 1005; October, 1947). The JOURNAL has been assured that these Committees will act cooperatively as a Joint Committee to secure results.

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman.

Attorneys' Fees—Deductible If Incurred in Defense of an Illegal Business?

■ On grounds of public policy, fines and criminal penalties can not be deducted in determining taxable net income. Ordinary and necessary expenses incurred in the conduct of what may be an illegal business are in a different category. The leading case is *Commissioner* v. *Heininger*, 320 U. S. 467, which involved a deduction for attorneys' fees paid by a seller of false teeth in contesting unsuccessfully a fraud order issued by the Postmaster General. The Supreme Court allowed the deduction; it found no public policy requiring that a person accused of a mail fraud be deterred from employing counsel to defend his business.

The Tax Court has reached an opposite result in *Anthony C. Stralla*, 9 T. C. — No. 109, decided October 29, 1947. Stralla and his associates operated a gambling ship off the coast of California. They were prosecuted for violating a California anti-gambling statute; a test case was

taken to the State Supreme Court to determine whether California had jurisdiction over the ship. This was a question of geography—the location of the ship in relation to the California shore line. The Supreme Court upheld the jurisdiction and reversed its decision by the District Court of Appeal. In disallowing the deduction of attorneys' fees incurred in this litigation, the Tax Court drew a distinction between a business which was wholly illegal, such as this, and one like Heininger's, which was illegal only in its method of operation.

The Tax Court also drew a distinction in favor of expenditures "made in the active production of the income". These would include the cost of supplies, wages, maintenance of the ship and the like, and would presumably be deductible. The attorneys' fees, on the other hand, were paid, according to the Court, in an effort to "assure the continuance of an illegal business". It will be observed, that if Stralla had won his case in the State Supreme Court the business would have been legal. There is no law against gambling on the high seas. Stralla's ship was to close to the shore, as it turned out, so the whole enterprise was illegal, and he lost his tax deduction.

How Not To Capitalize a Corporation

The income tax advantages, to a corporation and its shareholders, of "debt capitalization" as compared with "stock capitalization" are well understood. The corporation may deduct interest on its indebtedness, even though it is owed and payable to its shareholders. Payments on the principal of the debt represent a return of capital and as such are non-taxable to the recipients. And a corporation in debt is considered less vulnerable to attack under Section 102 (the penalty tax based upon an "unreasonable accumulation" of surplus), since such a corporation can more easily justify a conservative dividend policy.

But in order to obtain these advantages, the debt must be real and not a mere equity interest in disguise. The question whether a particular corporate security represents a true obligation or something in the nature of preferred stock has been frequently litigated, to determine whether or not the corporation is entitled to an interest deduction. Such cases have in the past turned upon the presence or absence of a definite maturity date, subordination to general creditors, the relation of interest to earnings, and other characteristics of the particular instrument.

In *Swoby Corporation* (9 T. C. — No. 118) decided October 31, 1947, a new factor was introduced into the equation: The relative amounts of "stock capital" and "debt capital". The case was an extreme one on its facts. Real property was transferred to the corporation, upon its organization, for $200 in stock and $250,000 in "debentures". Quoting from an aside by the Supreme Court in the *Kelly* and *Talbot Mills* cases (326 U. S. 521), the Tax Court held that the "debentures" were the equivalent of stock and hence that the annual payments to the holder were dividends, not interest. The *Swoby* "debentures" were probably vulnerable on the other grounds, too, in view of their remote maturity, subordination to general creditors, etc.; but the decisive factor in the eyes of the Tax Court was the corporation's "obviously excessive debt structure".

The case involved only the interest deduction, but such a decision can have other important tax consequences. For example: If corporate earnings are used to make payments upon the principal of the "debentures" or to retire them, the holder (being also a stockholder) will probably be subject to a dividend tax under Section 115 (g), which deals with the redemption of stock in a manner "essentially equivalent to the distribution of a taxable dividend". On the other hand, if the earnings are not paid out by the corporation, it may lay itself open to attack under Section 102.

What degree of imbalance as between stock and debt will give rise to these unhappy consequences remains to be determined. Perhaps the authority of the *Swoby* case may be limited to its peculiar and extreme facts. Otherwise a new uncertainty is introduced into the already-confused corporation-stockholder relationship.

Cost of Travel to and from Your Law Office—You Can't Win

In 1940, John Bruton, associated with the law firm of Sullivan & Cromwell in New York City, underwent a major operation which left him partially paralyzed. It was therefore necessary for him, when he returned to work in 1942, to arrange for taxicab service between his home and his office. This was the least expensive mode of transportation available to him in his condition. He expended some $500 in this way, during each of the years 1942 and 1943, and deducted these amounts in his income tax returns, under Section 23 (a) (1) (A), as ordinary and necessary expenses incurred in carrying on his trade or business. Without this expenditure for special transportation service, he would not have been able to work and would have produced no taxable income.

The Tax Court upheld the Commissioner in disallowing the deductions. *John C. Bruton*, 9 T. C. —, No. 117, decided October 31, 1947. The Court relied heavily upon the Regulations, which have long provided that: "Commuters' fares are not considered as business expenes." The equities favored the taxpayer, but deductions are looked on as a matter of legislative grace and do not rest upon "general equitable considerations". Bruton's expenses were personal in nature and therefore non-deductible, even though without them he would have earned no income whatsoever. In this latter respect, Bruton was no different from anyone else: Somehow or other every lawyer must get himself to his office. If he is partially paralyzed, he still has to get there as best he can but at his own expense.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1948 Annual Meeting and ending at the adjournment of the Annual Meeting in 1951:

Arizona	Nebraska
Dist. of Columbia	New Jersey
Connecticut	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

Election will be held in the State of

Arizona and in the

District of Columbia

for State Delegates to fill the vacancy in the term expiring at the adjournment of the 1948 Annual Meeting.

Election will be held in the State of

New York

for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1949 Annual Meeting.

State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Nominating petitions for all State Delegates to be elected in 1948 must be filed with the Board of Elections not later than April 9, 1948. Petitions received too late for publication in the April Journal (deadline for receipt March 10) cannot be published prior to distribution of ballots, fixed by the Board of Elections on April 20, 1948.

Forms of nominating petitions for the three-year term, and separate forms of nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. *Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 9, 1948.*

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the States in which elections are to be held within thirty days after the time for filing nominating petitions expires.

Board of Elections
Edward T. Fairchild
Chairman
William P. MacCracken, Jr.
Harold L. Reeve

Nominating Petition

Illinois

The undersigned hereby nominate Stephen E. Hurley, of Chicago, for the office of State Delegate for and from the State of Illinois to be elected in 1948 for a three-year term beginning at the adjournment of the 1948 Annual Meeting:

Messrs. Amos H. Robillard and Donald Gray of Kankakee;

Messrs. J. F. Dammann, Chas. O. Rundall, James F. Oates, Jr., Francis X. Busch, John D. Black, Julius H. Miner, Walter Brewer, Harry S. Ditchburne, Paul M. Godehn, L. Duncan Lloyd, Benjamin Wham, Thomas L. Marshall, Wm. H. King, Jr., George W. Lennon, Lawrence C. Mills, James P. Carey, Jr., Edward R. Adams, David F. Matchett, Jr., Thomas R. Mulroy, John Neal Campbell, Chas. L. Byron, James A. Sprowl and Henry S. Rademacher, of Chicago.

Proceedings of Probate and Trust Law Divisions Are Reprinted

■ The Bank of New York has again reprinted and circulated extensively the proceedings of the Probate and Trust Law Divisions of the Association's Section of Real Property, Probate and Trust Law at the 1947 Annual Meeting in Cleveland. The attractive 56-page booklet contains the following useful papers:

Estate Planning and the Lawyer, Stewart F. Hancock.

Tax Problems of Community and Joint Property, W. L. Nossaman.

Rights of Spouse in *Inter Vivos* Trusts, Robert P. Goldman.

Trusts from Appellate Court's View, Chief Justice Carl V. Weygandt.

State and Federal Taxation, Paul E. Farrier.

"Prudent Man Rule" of Trust Investments, Fred N. Oliver.

Standard Clauses for Wills and Trusts, C. Sidney Neuhoff.

Legislation Affecting Trusts and Estates, James C. Shelor.

Pension and Profit Sharing Trusts, Bernard E. Farr.

Probate and Trust Decisions, Henry B. Pflager.

Trust and Probate Literature, Emma M. Cummings.

Especially helpful to practitioners may be the bibliography of books and law review articles published on trust and probate subjects during 1946-47.

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House of Delegates:

Proceedings at the 1947 Annual Meeting

■ Four sessions of the Association's representative body were held in Cleveland during the 1947 Annual Meeting, with every State represented and an attendance of 175 delegates. Various of the important actions taken were stated separately in our November and December issues; following is the usual summary of the whole proceedings of the House. Publication has been delayed because of the enforced curtailment of our number of pages per issue. Readers will find in this report much that is interesting and important for the profession and the public.

■ The House of Delegates was convened for its first session of the 1947 Annual Meeting, at 2 o'clock Monday, on September 22. After the roll call, President Carl B. Rix took the chair.

Every State was represented by one or more delegates present. The total membership of the House as constituted for this meeting was 175.

The report of the Committee on Credentials and Admissions, Glenn M. Coulter, of Michigan, as Chairman, was approved. Secretary Joseph D. Stecher, after noting that no corrections had been submitted for the record of the last meeting of the House as published in the JOURNAL, moved that the record be approved. This was carried.

In a brief statement, President Rix declared that the Association's work during the past year had been "extremely inspiring", and that Bar Associations all over the country are "at work as they have not been for years". He particularly lauded the infusion of spirit brought about by the return to the profession of many young men from the Armed Forces, of whom he said: "They want action, and they want positive action, and that is what this Association is endeavoring to give".

In response to their demand, he said, the work of the new Committee on Lawyers' Participation as Citizens in Public Affairs is being activated, with a membership that includes many lawyers who have devoted years of their professional lives to public affairs.

A start on the road to a nonpartisan federal judiciary has been made, according to President Rix, through the splendid cooperation between the Association and the Senate Committee on the Judiciary, under the chairmanship of Senator Alexander Wiley, of Wisconsin. More than half of the 3000 bills introduced in the recent Congress were referred to that Committee; "numberless times" the Association's aid has been asked for as to their analysis or improvement.

A shrinkage in Association membership, deemed to be a possible result of the increase in annual dues as of July 1, 1947, did not materialize. Instead, there was an increase in net membership from 36,484 on July 1, 1946, to 40,209 on July 1, 1947. On September 1 the membership was 40,556, with 734 pending applications.[1]

President Rix then called to the rostrum Morris B. Mitchell, of Minnesota, 1946-47 Chairman of the Membership Committee, who received hearty applause. He paid tribute to the work of the Committee and to efforts of State membership chairmen, the Membership Committee of the Junior Bar Conference, individual members of the House, and the membership staff at Headquarters.

Mr. Mitchell presented Miss Florence Guernier, hard-working head of the membership staff, who was given an ovation in appreciation of her diligent and successful work.

President Rix then relinquished the chair to Chairman Howard L. Barkdull, of Cleveland. Secretary Stecher reported the nominations for election to the Board of Governors, made by the State delegates at their meeting in Chicago on February 25. No other nominations having been filed, the unopposed nominees were elected, as reported in 33 A.B.A.J. 799; August, 1947.

Report of Inter-Meeting Actions by Board of Governors Approved

Secretary Stecher reported that the

1. As of December 1, 1947, the Association membership was approximately 41, 308.

Board of Governors had met in Washington, D. C., on June 1 to 3 and in Cleveland on September 19 to 21. He reminded that at the Mid-Winter Meeting the House had referred to the Board requests for the establishment of a Judge Advocates' Section of the Association and for an agency or agencies to study the conservation of natural resources and possible emergency legislation for enactment in a time of war. He informed the House that the Board of Governors made the following report:

1. That the subject of emergency legislation is one which should be handled by the National Conference of Commissioners on Uniform State Laws and should not be lodged in a Section.

2. That the conservation of natural resources is beyond the jurisdiction of the Association, except to the extent that it is already receiving attention in the Section of Mineral Law; and

3. That no Section on National Defense or Judge Advocates' Section be created at this time, but that the matter be open for further discussion at some future time, if desired.

Other actions of the Board, as reported to the House by Secretary Stecher were:

1. Authorizing the President to appoint two special committees, one to consider S. 1156, a bill introduced by Senator Pat McCarran for the purpose of restoring States' rights and powers (see 33 A.B.A.J. 525; June, 1947), and the other to be designated the Committee on Lawyers' Participation as Citizens in Public Affairs (see 33 A.B.A.J. 696; July, 1947).

2. Selecting as the subject for the 1948 Ross Prize Competition: "What Steps Should Be Taken by the National and State Governments to Preserve the American Federal System and Restore Powers and Responsibilities to the State and Local Governments?"

3. Concluding that establishment of a news publication by the Association, authorized at the last Annual Meeting by the House, was not feasible, financially or otherwise, at the present time, but directing that a special committee of the Board be continued for the purpose of further studying all Association publications.

4. Authorizing the Board of Editors of the JOURNAL to employ a Managing Editor.

5. Re-electing Eugene C. Gerhart, of Binghamton, New York, to the Board of Editors of the JOURNAL for a period expiring at the adjournment of the 1952 Annual Meeting.

6. Approving a change of name of the Special Committee on Low-Cost Legal Service Bureaus to the Special Committee on Low-Cost Legal Service.

7. Approving the Uniform Ancillary Administration of Estates Act, presented by the National Conference of Commissioners on Uniform State Laws.

8. Electing James C. McRuer, Chief Justice of the High Court of Ontario, Canada, an honorary member of our Association.

The House voted to approve the actions reported by Secretary Stecher, except in respect of the Uniform Ancillary Administration of Estates Act, which was held for separate action.

Increased Costs Put Severe Strains on Association Finances

Treasurer Walter M. Bastian, of Washington, D. C., pointed out that the operations for the Association year 1946-47 resulted in a deficit of $87,240.68, the dues increase not being effective until July 1, which deficit was sustained by the General Fund surplus, leaving a net balance of $106,365.67 in that Fund.

Such a deficit was expected, Treasurer Bastian explained, and he attributed it partially to the purchase of much equipment and materials which would normally have been obtainable and been charged for over a period of four or five years. In this connection, he told of the purchase of equipment to establish a new accounting system in the Headquarters office and of major remodelling projects at the Headquarters building. He said that the cost of continuing the various Association programs presents "a more than serious problem", and that the Association believes in a balanced budget—a goal which increased dues will help to achieve. He concluded by asking that new projects and all increases in current expenses be examined carefully and that strict economy be practiced.

Following this report, President Rix praised the JOURNAL for its part in maintaining and increasing the membership despite the increase in dues. Although increased costs of printing and producing the JOURNAL accounted for a large part of the deficit, the President declared that it is "bringing home to the members the work of the Association in a way that we have never been able to do before".

Judge Frank C. Haymond, of West Virginia, in making his report as Chairman of the Budget Committee, announced that the budget for the Association for the fiscal year 1947-48 is based upon a total annual income of $468,400. Appropriations totalling $455,739 had been made, among the major items of which are:

1947 Annual Report	$50,000
Legal Aid	10,000
Publicity	10,000
Junior Bar Conference	12,500
Legal Education	12,500
Headquarters	113,889
JOURNAL	120,000[2]

Debate and Amendment as to Resolution on the "Jury Bills"

The first Committee report taken up by the House was that of the Committee on Jurisprudence and Law Reform, of which Thomas B. Gay, of Virginia, was the Chairman. The first resolution supported the passage of the "jury bills" (S. 17, S. 18 and S. 19). State Delegate Frank W. Grinnell, of Massachusetts, a member of the Committee, filed a

2. Under Article IX of the Association By-Laws as amended, the sum of $2.50 per Association member is set aside from the annual dues as the subscription price per member. With 41,000 members this would produce $102,500. Under the Association's budget, the difference between $120,000 and the total produced by the $2.50 per member is made up from Association funds.

minority report as to S. 18 and moved an amendment. After considerable debate, the House voted the amendment and adopted Resolution No. 1 as follows, with the amendment shown in italics:

> RESOLVED, That the House of Delegates of the American Bar Association approves S. 17, entitled "A Bill to provide for a jury commission for each District Court of the United States, to regulate its compensation, to prescribe its duties, and for other purposes"; S. 18, entitled "A Bill to establish uniform qualifications of jurors in the Federal Courts, and for other purposes", *Provided, that the Act shall not apply to doctors, schoolteachers, members of the Bar, clergymen or mothers of minor children under the age of seventeen years, unless such persons are eligible for jury service under the law of the State;* and S. 19, entitled "A Bill relating to the payment of fees, expenses and costs of jurors"; and requests the Committee on Jurisprudence and Law Reform to advocate passage of said Bills, if and when so amended, in the Congress of the United States.

Resolution No. 2 offered by the Committee dealt with S. 23 and was adopted, as follows:

> RESOLVED, That the House of Delegates of the American Bar Association approves S. 23, entitled "A Bill to incorporate into the Judicial Code the provisions of certain statutes relating to three-Judge District Courts, and for other purposes," if and when amended as recommended in the Report of the Committee on Jurisprudence and Law Reform this day presented and read to the House, and said Committee be and it is hereby authorized and empowered to advocate the passage of said bill if and when so amended in the Congress of the United States.[3]

In adopting Resolution No. 3 the House approved S. 24, to allow the Attorney General of the United States to appoint one or more assistant district attorneys if in his opinion and that of the United States Attorney for any district or territory the public interest requires it, provided the proposed legislation is changed to also include the approval of the District Judge as to such an appointment.

Other Resolutions as to Federal Courts Are Adopted

The House adopted also Resolution No. 4, to give approval to S. 25, which would amend the Judicial Code so as to broaden the power of the Court to permit Court reporters to be employed in reporting proceedings before commissioners appointed to determine just compensation in condemnation proceedings, referees in bankruptcy, United States commissioners, grand juries, or any other proceeding specifically excluded by order of Court from the scope of duties to be required of the official reporter of such District Court.

Resolution No. 5 from the Committee related to S. 51, which would qualify before all federal administrative boards and agencies any attorney who is duly qualified to practice in the highest Court of his own State. George M. Morris, of the District of Columbia, moved that this matter be referred to the Section of Administrative Law and the Committee on the Unauthorized Practice of Law, in view of their activities in behalf of the more comprehensive Administrative Practitioners Act (H.R. 2657), introduced at the request of the Association by Congressman John W. Gwynne, of Iowa. (For the text of this bill, see 33 A.B.A.J. 307; April, 1947). This motion, containing a request that the Section and Committee report back to the House during its session, was carried.

The House adopted Resolution No. 6, supporting legislation to increase the statutory minimum compensation of deputy clerks and commissioners of the United States district Courts from $3000 to $5000.

Resolution No. 7, also adopted without changes, approved legislation to provide necessary officers and employees for Circuit Courts of Appeals and District Courts.

The Committee's Resolution No. 8 approved S. 530, to authorize the federal Courts to allow reasonable attorney's fees to the prevailing party, other than the United States, in any suit by or against the United States in Courts of the United States, any fee so allowed to be in addition to that taxable under the provisions of the existing statutes. After debate, the resolution was adopted with the addition of the following amendment, offered by T. M. Galphin, Jr., of Kentucky: "Provided, however, that nothing in this Act shall preclude the attorney and the client from agreeing upon a fee to be credited by the amount of the fee collected from the government".

Chairman Gay informed the House as to the details of a change in the form of the Jennings bill (H.R. 1639) as to the venue of actions under the Federal Employers' Liability Act, and the favorable report by the Committee of the House of Representatives on the amended bill. The House had approved the Jennings bill in principle and substance at previous meetings.

Resolutions in Aid of Lawyers in Devastated Countries Adopted

Chairman Barkdull introduced Jacob M. Lashly, of Missouri, a former President of the Association, who gave a stirring but objective report for the Special Committee on Aid to Lawyers in Devastated Countries. Chairman Lashly had lately returned from a five-weeks' trip through continental Europe for the purpose of studying the needs of judges and lawyers in areas where the profession of law is endeavoring to re-establish its independent functioning, in the face of many hardships and privations. (See our November issue, page 1116; December issue, page 1189).

The House adopted the following three resolutions of his Committee:

> (A) RESOLVED, That the President and the Board of Governors be authorized and directed to appoint a number of representative members of the Association to make a demonstration of good will and sympathetic interest in the Bars of France and of Italy, and such other European countries as the President and the delegation shall determine, and that the manner of such

3. The amendment proposed in the report of the Committee was to the effect that amendment of Section 210 of the Judicial Code, as effected by S. 23, should provide that communities, associations, corporations, firms and individuals desiring to intervene in proceedings before the Interstate Commerce Commission or in any suit which may be brought by anyone relating to any action of the Commission, "establish to the satisfaction" of the Commission "a *substantial* interest in the controversy or question" rather than merely allowing those "who are interested in the controversy or question" to so intervene.

demonstration, the expenses thereof and the way in which it shall be borne, and all other details and particulars shall be left to the discretion of the President, by and with the consent of the Board, with full power.

(B) RESOLVED, That it is the recommendation of the Association that the Surplus Property Act of 1944, with amendments, be implemented by appropriate contracts with the interested allied foreign powers, and that operations thereunder be set in motion with all speed consistent with proper administrative procedure.

(C) RESOLVED, That the American Bar Association, through its President and Secretary, send a fraternal greeting and message of encouragement and cheer to that group of American lawyers engaged in the legal work of the military occupation now being carried out by the United States.

The House next adopted two recommendations of the Committee on Aeronautical Law, submitted by Chairman Charles S. Rhyne, of the District of Columbia:

(1) Urging the International Civil Aviation Organization to consider an increase in the present presumptive liability limitation of $8291.87 on damages for death or personal injury in international air transportation imposed by the Warsaw Convention, and

(2) Authorizing the Committee on Aeronautical Law to cooperate with and furnish pertinent information to the Legal Section of the International Civil Aviation Organization on international agreements under consideration by that Section.

Second Session

■ The second session of the House of Delegates was called to order at 9:30 o'clock on Wednesday morning, September 24.

The House first approved a resolution from the Committee on Securities Laws and Regulation, by Chairman William A. Schnader, of Pennsylvania, requesting the National Conference of Commissioners on Uniform State Laws to prepare legislation making uniform States' requirements preliminary to the issuance of securities.

W. E. Stanley, of Kansas, gave the report of the Committee on Ways and Means. There were then 1060 sustaining members of the Association; only thirteen reverted to regular membership during the past year. For 1947-48, an increase of 250 to 300 is expected.

Sharp debate was occasioned by a recommendation of the Committee that it be constituted with powers which were interpreted as giving it authority to pass on the creation of new committees and projects of the Association, to the end that deficits will not be brought about by overextensions of activities. Secretary Stecher reported that the Board of Governors disapproved of this part of the Committee's resolution; Cody Fowler, of Florida, spoke for the Board in opposition to it. President Rix also opposed the provision.

Resolutions on International Law and the UN Are Approved

At 10 o'clock the consideration of this matter was suspended in order that the House take up as the special order of business the report and recommendations of the Committee on Peace and Law Through United Nations, which were submitted by Former President William L. Ransom. The action of the House in adopting the seven resolutions offered by this Committee was given, with their text and some excerpts from the Committee's report, in 33 A.B.A.J. 1090; November, 1947.

Chairman Willard B. Cowles, of New York, made the report of the Section of International and Comparative Law. Without debate the House adopted the following recommendations:

(1) Urging the U.S. to adopt "as a firm policy the practice of referring all international questions or disputes susceptible of being decided on the basis of law, which cannot be settled by direct negotiations, to the International Court of Justice or to arbitral tribunals to assure impartial third-party determination."

(2) Urging the U. S. to insist on the inclusion of the terms of the obligatory arbitration clause of the Inter-American Treaty of 1929 in any document dealing with the subject of arbitration adopted at the forthcoming Ninth International Conference of American States.

(3) Urging the Executive department to expedite the interchange of students under the Fulbright Act.

(4) Urging the Congress to appropriate increased funds for the interchange of students and professors.

(5) Endorsing and supporting the establishment of a center "for the collection, coordination, editing, translation, publication and dissemination of bibliographical information concerning Latin-American law, jurisprudence and publications of interest to the legal profession", to be operated under direction of the Library of Congress and financed by the U. S. and other countries of this hemisphere.

(6) Endorsing and supporting the principles and policies of conservation of fisheries under the Proclamation of the President of September 28, 1945.

Sections Disagree on Convention as to the Rights of Authors

Resolution No. 7 urged ratification by the United States, with some minor reservations, of the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works of 1946. Chairman Cowles reminded that the Section of Patent, Trade-Mark, and Copyright Law had disapproved the ratification of this Convention, and that in view of the divergent views of the two Sections, a joint Committee had been appointed. He said that Resolution No. 7 embodied the result reached by this joint Committee.

Charles H. Walker, of New York, Chairman of the Section of Patent, Trade-Mark and Copyright Law, declared that his Section was still opposed to the resolution. He moved a substitute for disapproval of the convention.

After extended debate, William Clarke Mason, of Pennsylvania, moved that both the substitute and the original motion be tabled. This was voted by the House.

Resuming consideration of the resolution offered by the Ways and

Means Committee, the House engaged in further debate, and then approved the proposal after voting to cut out the last sentence, which read: "New activities involving the expenditure of Association funds shall be referred to said Ways and Means Committee for report and recommendations before action by the House of Delegates or the Board of Governors".

The report of the Committee on Professional Ethics and Grievances was made by its Chairman, Henry S. Drinker, of Pennsylvania. Recess at 12:15 o'clock was taken.

Third Session

■ The third session was called to order at 9:30 o'clock on Thursday morning, September 25. First the House adopted a recommendation of the Committee on Custody and Management of Alien Property that the Committee be discharged.

Harrison Tweed, of New York, gave the report of the Committee on Legal Aid Work. As to the grant of $10,000 per year for three years, he said that work has been under way in Delaware, Georgia, New Jersey, New York, Virginia, Ohio, Indiana and Illinois. During the coming year, the Committee hopes to extend its efforts into Pennsylvania, Virginia, West Virginia, and perhaps Tennessee. He said that the reason the legal aid program is succeeding is because of the support of the Association.

The House voted to adopt three resolutions recommended by the Committee on Customs Law, of which Albert MacC. Barnes, of New York, was Chairman. These were to the following effect:

(1) Urging inclusion of an escape clause granting the right of judicial review in any multilateral or bilateral trade agreement entered into by the United States.

(2) Authorizing the Committee to oppose H. R. 3810 unless it is amended to provide judicial review of the action of the Secretary of the Treasury.

(3) Authorizing the Committee to oppose any trade agreement negotiated under the Tariff Act of 1930, which purports to repeal or amend existing statutes by Executive agreement without the specific approval of the Congress.

The report of the Committee on the Bill of Rights was presented by Robert R. Milam, of Florida, its Chairman.

Chairman John D. Randall, of Iowa, in rendering the report of the Committee on the Unauthorized Practice of the Law, called attention to a provision of H. R. 3214, which would make the Tax Court of the United States a part of the judicial system— the provision allowing laymen to practice before the Court as in the past. He said that the bill had passed the House of Representatives and was pending in Senate sub-committee, where it was being opposed by his Committee. He also outlined briefly the provisions of the Gwynne bill (H. R. 2567; known as the Administrative Practitioners Act; for text see 33 A.B.A.J. 307; April, 1947), of which the Board of Governors had authorized joint sponsorship by the Committee on the Unauthorized Practice of the Law and the Section of Administrative Law. The House of Delegates approved a recommendation to the effect that no action be taken by it on S. 51 in view of the pendency of the Gwynne bill.

Amendments of the Constitution and By-Laws Are Adopted

The House next took up consideration of the various filed amendments to the organic law of the Association. These were explained by Charles M. Lyman, of Connecticut, Chairman of the Committee on Rules and Calendar. All of the amendments to the Constitution and the By-Laws, which were published on pages 782-784 of the August, 1947, issue of the JOURNAL, were approved. In the proposed amendment of Article X, Section 17, of the By-Laws, the first subparagraph (b) was adopted; and in the amendment of Article XI of the By-Laws, the clause, "other than a brief filed with a legislative committee", was inserted after the first clause of the new sentence added by the amendment.

Herbert W. Clark, of California, a member of the Council of the Section on Legal Education and Admissions to the Bar, gave the report of that Section and offered the following resolutions, each of which was adopted by the House:

(1) Implementing an agreement with the American Law Institute for continuing education of the Bar, through the appointment of a joint committee of the Institute and the Association.

(2) Condemning the approval, under provisions of the Servicemen's Readjustment Act, by the Veterans' Administration and other accrediting agencies of the several States, of correspondence law schools and courses as a means of preparation for admission to the Bar.

(3) Recommending that the numbers and percentages of students from each law school, passing and failing, classified as to first-time applicants and repeaters, be made public after Bar examinations.

Recommendations Concerning Federal Judiciary Are Adopted

A brief outline of activity and some success, as to appointments to the federal judiciary, was given by John G. Buchanan, of Pennsylvania, Chairman of the Committee on the Judiciary. Mr. Buchanan said that his Committee had received cordial cooperation from Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary.

The House adopted a resolution offered by the Committee. This directed the Committee on Jurisprudence and Law Reform to request the introduction of legislation in the new Congress to provide a tribunal for trials of and judgments upon the issue of "good behavior", in the case of federal judges other than justices of the Supreme Court.

Two resolutions presented by Chief Justice Robert G. Simmons, of the Supreme Court of Nebraska, Chairman of the Section of Judicial Administration, were adopted by the House. The first approved the con-

tinuance of Regional Conferences of traffic Court judges and prosecutors in collaboration with Northwestern University and the second gave support to a conference of judges on the traffic Court and justice of the peace level.

Walter W. Land, of New York, Section Delegate from the Section of Real Property, Probate and Trust Law, reported for the Section that it concurred in the recommendation of the Committee on Jurisprudence and Law Reform in support of H.R. 320. The House then adopted the resolution embodying this approval. Action on a resolution that the House disapprove those sections of the Wagner-Ellender-Taft bill which provides for extension of the federal government's operations into the public housing field was deferred until the Mid-Winter meeting; copies of the bill were not available to the House membership. The Section of Municipal Law was also directed to consider the legislation and report at the meeting.

Resolutions from the Committee on Commerce Are Acted On

Harold J. Gallagher, of New York, presented resolutions from the Committee on Commerce. Resolution No. 1, approving the McCarran bill (S. 1159), which proposes amendments of the Administrative Procedure Act to protect the jurisdiction of the States and their agencies, etc., was referred to the Section of Administrative Law. The House approved Resolution No. 2, in favor of a consultative service of the Department of Justice and the Federal Trade Commission as to proposed actions which may involve violation of the anti-trust laws, and the exemption of a corporation from criminal prosecution after it has in good faith gained clearance for a proposed action; Resolution No. 3, disapproving the Kefauver and O'Mahoney bills (H. R. 3736 and S. 104), which, among other things, would prohibit the acquisition of assets where the acquisition of capital stock is now prohibited; Resolution No. 4, disapproving the so-called Anti-Monopoly Program Bill (S. 72); and Resolution No. 5, disapproving the O'Mahoney bill (S. 10) for the licensing of corporations.

Robert G. Storey, of Texas, Chairman of the Committee on the Rights of Veterans, made a brief report and moved that his Committee be discharged. This was carried.

William A. Dougherty, of New York, Section Delegate of the Section of Mineral Law, offered a resolution from that Section to approve the Rizley bill (H. R. 4051), which would amend the Natural Gas Act of 1938 to limit the jurisdiction of the federal authority to transportation in interstate commerce and the sale in international commerce of natural gas for resale. After Charles S. Rhyne, of the District of Columbia, had spoken in opposition to this legislation, a motion to table the resolution was carried.

The third session recessed at 12:30 o'clock.

Fourth Session

■ The concluding session of the House at the 1947 Annual Meeting convened at 9:30 o'clock on Friday morning, September 26.

Four resolutions offered by Murray Seasongood, Chairman of the Committee on Civil Service, were adopted:

(1) Commending "A Model State Civil Service Law", prepared by the National Civil Service League, the Civil Service Assembly of the United States and Canada, and the National Municipal League, as "a desirable basis for sound civil service laws".

(2) Recommending the elimination of Senate confirmation of postmaster appointments and a return to the requirement that selections be from civil service eligible lists in strict numerical order of examination ratings.

(3) Disapproving special legislation tending to cripple the effective operation of a merit system.

(4) Approval of S. 999, which would amend the Veterans' Preference Act of 1944 and restrict veterans' preferences in civil service on the basis of disabilities.

George M. Morris, of the District of Columbia, presented the following resolution, which was adopted:

> RESOLVED, That the Board of Governors is advised that its reports to the House of Delegates on recommendations of the Association's Sections and Committees would have a greater value to the House if, (1) the Board examines such recommendation with an eye to the possible jurisdiction over the subject matter of other Sections or Committees; (2) where the subject matter of any recommendation appears to lie in whole or in part in an Association Section or Committee other than that making the recommendation, the Board will report the position of such other Section or Committee respecting the recommendation.

Report Made as to Progress of Uniform State Laws

A short review of the year's work of the Conference of Commissioners on Uniform State Laws was given by W. E. Stanley, of Kansas, its President. He reported that much progress has been made on the Commercial Code and that it is hoped that it will be ready for the action of State legislatures in 1951.

The Conference has drafted and approved a Uniform Ancillary Administration of Estates Act, Mr. Stanley said; he moved approval of the draft. William M. James, of Illinois, moved that the proposed Act be referred to the Section of Real Property, Probate and Trust Law. Inquiry showed that that Section had not acted on the draft. Mr. James' motion for reference to the Section for recommendation was carried.

William W. Evans, of New Jersey, reported for the Committee on State Legislation.

Edmund B. Shea, of Wisconsin, gave the report of the Committee on Communications. The House approved two resolutions which recommended support of sections of S. 1333 providing, respectively, for the right of hearing for an interested party and the right to intervene and participate in an appeal for an interested party, in regard to the Federal Communications Commission.

A report on projected plans for the tour of the Freedom Train, and the

Re-dedication Week to be held in each community in conjunction with the Train's visit, was made by Louis Waldman, of New York, Chairman of the Committee on American Citizenship.

George M. Morris, of the District of Columbia, reported for the Committee on Public Relations. In the absence of Senior Circuit Judge John J. Parker, who had to leave Cleveland to attend the Judicial Conference of Senior Circuit Judges in Washington, Chairman Barkdull placed before the House the report of the Committee on Improving the Administration of Justice.

Mr. Lyman stated that the Junior Bar Conference wished that the consideration of its recommendations be deferred until the Mid-Winter meeting. A motion to that effect was carried.

A report by the Section of Patent, Trade-Mark and Copyright Law was given by its Chairman, Charles H. Walker, of New York.

John R. Snively, of Illinois, offered the report of the Section on Criminal Law, with a resolution authorizing the Section to award each year in the name of the Association a "citation to the city making the most progress in the improvement of its traffic court practice and procedure". After some debate, this was voted.

The Section was also authorized, along with the Junior Bar Conference, to continue participation in Traffic Institutes.

The Section of Taxation presented eleven resolutions, all of which were approved by the House.

Association Reiterates Stand for Improving Military Justice

The House concurred with the Assembly in adopting a resolution to approve H. R. 2575, as to improvements in military justice. An Assembly resolution for the memorializing of the Congress to renounce title to tide lands recently declared to belong to the government of the United States was referred by the House to the Board of Governors for reference by it to a Committee or Section for recommendation and action.

The report of the Committee on Draft was given by Osmer C. Fitts, of Vermont. He offered the following resolutions, which were adopted:

RESOLVED, That the Committee to be appointed under Resolution (A) of the Committee on Aid to Lawyers in Devastated Countries be charged with investigation, consideration and appropriate action toward publicizing the safest and most economical methods of dispatching packages of food to our professional brethren in the devastated countries of Europe and Great Britain.

RESOLVED, That the American Bar Association and its members in national convention assembled are duly appreciative of the hospitality and cordial reception by members of the Bar of the city of Cleveland, and the Secretary of this Association is directed to advise the President of the Bar Association of this resolution of appreciation and thanks.

A resolution calling for formation of a committee to report suggestions as to how the Bar might cooperate in stimulating an improved spiritual consciousness in America was referred to the Committee on American Citizenship.

The Committee on Hearings had no report. Glenn M. Coulter, of Michigan, gave the supplemental report of the Committee on Credentials and Admissions of the House.

Secretary Stecher stated that at the meeting of the State Delegates last February 25, the following nominations for officers of the Association were made:

For President: Tappan Gregory, of Illinois.

For Treasurer: Walter M. Bastian, of the District of Columbia.

For Secretary: Joseph D. Stecher, of Ohio.

No other nominations having been made by petition, M. J. Galvin, of Minnesota, moved that the Secretary cast a unanimous ballot for those nominees. This was carried; President Rix declared them the officers of the Association for the ensuing year.

The final session of the 1947 House adjourned at 11:25 o'clock on Friday, September 26.

(Continued from page 7)

the jury, that in these organs of the body there were so many grains of arsenic, which might have come from the soil. How are you to know some of that arsenic was not deposited from the soil of the Lewannick Churchyard? That was easy, but the strands of hair, nothing would avail to say that the arsenic found there came from the outside. That came from administration from within. And so you perceive how in a case of that nature, and indeed in all cases, the preliminary work of conference, of understanding details that may perhaps never be used in the case, is of the utmost importance.

Importance of a Proper Opening Statement to the Jury

As I said before, all that side of the work of advocacy is an integral part of the mastering of the brief, the assimilation of the expert's knowledge in the conference room, then into the Court and the presentation of the case. We begin, as you know, by the leading counsel for the Crown, or leading counsel for the plaintiff, making a short opening statement to the jury in a jury case. And again, it would be almost a truism to say that more cases are won by a proper presentation of that opening statement than in any other way. The jury, fresh to the Court, fresh to the case, hear a presentation, and they are never, never likely to forget. Shaken they may be by cross-examination, by subsequent witnesses, but that first, clear, incisive impression made upon the jury is beyond all price.

Then there is the calling of wit-

nesses, what we call the examination-in-chief—a most delicate and difficult task. And I have always found for my own part that, if you can so conduct your examination-in-chief that your opponent must sit still, that is a very great triumph; but if you so conduct yourself that you give your opponent the opportunity of protesting against leading questions or other irregularities your influence begins to go, your control over the jury begins to vanish. And I can not emphasize as much as I would wish the importance of paying attention to the proper examination-in-chief. Indeed, I would lay down for myself that a very sound working rule is so to conduct your case that the interruptions of your opponent are matters that will be frowned on by the Court.

Cross-Examination in the "Blazing Car Murder" Case

And then cross-examination—the thing which everybody thinks he can do so well and the thing that is rarely so very easy to do well. Sometimes you have a moment of inspiration. At one of our big murder cases, which is now fairly well known as the "Blazing Car Murder", a man called Rouse was accused of burning the body of his victim at a little village called Hardingstone in Northamptonshire in the middle of the night. It was a most remarkable case. I wish I had time to tell you about it. The victim was never identified, although the case was discussed from one end of our land to the other. Nobody ever came forward anywhere to say they had ever known this unknown man, and there were all sorts of features of that kind. The question before the jury, raised by the defense, was whether the burning was accidental. There had been a joint—it was a Ford car—and there had been a joint where it was said that the petrol leaked and the heat of the car had made this joint much looser. That was the line upon which the defense was run. I was the counsel for the Crown and a man came in to the box for the defense who called himself an expert witness. As you probably have it in Canada and as we have it in England, any case of what I will call notoriety always brings people from all parts of the land volunteering to give evidence because of the kudos that their presence in the box gives.

This was a man exactly of that type. And there was I rising to cross-examine him, and whether it was inspiration or what it was I don't know, but my first question in the cross-examination of the man certainly wasn't in the brief. I said: "Tell me, sir, what is the coefficient of the expansion of brass?" And he didn't know. I am not sure that I did, but he couldn't ask me questions and I could ask him, and he didn't know. And from that moment, of course, it was easy.

Skillful Cross-Examination You Have to Get from Your Judgment

And the cross-examination to a very large extent must depend upon the kind of man you are. You can't get it from your brief; you must use your judgment. And above all don't ask the one question too many. They tell a grand story about a bastardy case in England where in the old days they used evidence of association as tending to show that the man accused was the father of the child. And in one of the country assizes towns there was an old farmer called to give evidence. He was cross-examined and the cross-examination proceeded upon these lines: "Well, sir, I suppose you were young once yourself?" "Yes sir," he says, "I was young once myself". "And I suppose you used to go walking through the lovely lanes and fields?"—"Oh yes," he says, "I walked the lanes and fields, all right". "And I suppose there were occasions when you went in those lanes and fields in the moonlight?"—"Oh yes," he said, "I went in the moonlight." "I suppose there were occasions when you had a girl with you?"—"Yes," he said, "there were occasions, I will admit, in these fields and lanes on moonlight nights when I had a nice girl with me." "Well," said the counsel, "I suppose there were occasions when you used to sit down on the hedge bottom on these moonlit nights with this nice girl?"—"Oh yes," he said, "we did that".

There he should have stopped. Instead of that, he asked one question too many; and he said to the old man: "Well now, tell me, there was nothing wrong about that, was there?" And the old man said to the judge: "*Am I bound to answer that question?*" No doubt, there are many classical illustrations of the man who in cross-examining gets all that he can ever wish to have, and who can not restrain himself, and asks the one question too many.

The Advocate Must Be a Man of Complete Integrity

Then we have, of course, the final address to the jury when all the evidence is over, when everything is presented in its final form. All these things about which I do not presume to speak at any length are all essential parts of the work of the advocate, but the matters that I did just want to speak about in a general way, before I sit down, about advocacy are these—they are quite general. The first quality beyond all others in your advocate, whatever his type, the first quality is that he must be a man of character. Without that in the long run all else fails. The Court must be able to rely upon you. Your word must be your bond, and when you assert, as a matter of fact, to the Court those matters which are within your personal knowledge the Court must be able to know that you in your integrity, on your responsibility as a member of a great profession, are being loyal to the Court.

You will forgive me saying it, but I am jealous of the very great reputation of the law. Its future is in our hands; and it is a solemn responsibility and duty cast upon every member of the practicing profession that in all he does, in his duty to the client, in his duty to the Court and in his duty to the State, he shall be above and beyond all other things a man of complete integrity. Whatever gifts or attributes he may possess, he shall have this supreme qualification

that he is a man of integrity and a man of honor.

An Advocate Should Be a Man of Culture as Well as Character

The other general observation I would like to make with regard to the advocate is this: I think he must be not only a man of character but a man of culture. You may remember in Sir Walter Scott's *Guy Mannering* the figure of Counsellor Pleydell, who went into his room and there were all the great poets and writers on the shelf, and pointing to the books, he said: "These are my stock in trade".

There can be no doubt that whilst the knowledge of law and the training in law is essential, of itself it is insufficient. There must be the cultural background out of which springs the serene mind, the subtle understanding, the insight, that which differentiates man from man. "Two men look out through the same bars, one sees the mud, and one the stars." That cultural background is open to everybody. It may very well be that there are some here who have not had the opportunity of a classical education and been made familiar with all the great ancient writers; it may very well be so. We are not all so fortunate as to be born in circumstances which permit it. It may be, that many were unable, as indeed they were in England, to go to universities like Oxford and Cambridge and to spend the leisure years in reading, absorbing and imbibing. These are very great advantages but they are not possible for all.

But what is possible for all is that there should be a cultural background created by themselves. Take the whole field of literature and what a repository, what a treasure we have there. Take the Authorized Version itself of King James' Bible. Why, there are some men who have achieved very great fame who had little more cultural background than that very great book. Some of the greatest examples of oratory in our land and in our speech were given by John Bright, and if you will examine that oratory you will find it derives from the Authorized Version. His very great speech in the House of Commons on the Crimean War owed all its power to the narrative of Herod's slaying of the first born. Lincoln, President Lincoln, owed much to the same source. And to familiarize yourself with that great repository of English prose is in itself an education.

Familiarity with the Greatest Expressions in Speech Is Essential

Shakespeare! Even a nodding acquaintance with Shakespeare is of the greatest possible advantage to the advocate, for there speech has reached the highest form that we have ever known or are ever likely to know. And if we can get just a touch of historical background with it, it becomes most moving and most magical. A few months ago I was privileged to be in Shakespeare's birthplace, Stratford-on-Avon, and I reflected that it was at Stratford-on-Avon that Shakespeare came at the end of his short and crowded life, and it was at Stratford-on-Avon that he penned those memorable words in which he took farewell of all the imaginative beauty which he had created. For it was there that he wrote *The Tempest*, and into the mouth of Prospero he put perhaps the greatest form of speech we are ever likely to know:

> You do look, my son, in a mov'd sort,
> As if you were dismay'd: be cheerful, Sir.
> Our revels now are ended. These our actors,
> As I foretold you, were all spirits, and
> Are melted into air, into thin air:
> And, like the baseless fabric of this vision,
> The cloud-capp'd towers, the gorgeous palaces,
> The solemn temples, the great globe itself,
> Yea, all which it inherit, shall dissolve,
> And, like this insubstantial pageant faded,
> Leave not a rack behind. We are such stuff
> As dreams are made of, and our little life
> Is rounded with a sleep.

To be familiar even for a moment with the greatest expression of that kind is, I think, not only a valuable addition to the advocate's art but an indispensable addition; and you no doubt have your own favorite passages in Shakespeare. The only other one I will quote is where I think the loveliness is still as perfect:

> Sit Jessica: Look, how the floor of heaven
> Is thick inlaid with patines of bright gold:
> There's not the smallest orb which thou behold'st,
> But in his motion like an angel sings,
> Still quiring to the young-ey'd cherubins,—
> Such harmony is in immortal souls;
> But whilst this muddy vesture of decay
> Doth grossly close it in, we cannot hear it.

I cite that merely to illustrate the admonition: Don't rely too much upon the law books. Our very dear friend George Pepper the other night made a beautiful speech at Osgoode Hall, and in the course of it he said: "If I were pressed I could tell you of every form of dower, dower at common law, and all the rest of it". And I said to George this morning: "My dear George, it was lovely to hear you, but let me tell you that in thirty-four years at the Bar I have never had one single case in which dower ever came into it".

And whilst these things are essential and training is invaluable, my advice is: Let your advocate be not merely a man of law—let him be a man of letters. Let him love the humanities, and from that springs the insight, the understanding and the judgment.

Cultivate and Love the Right Use of Words

The last thing that I would like to say to you, as a third matter for the advocate, is to cultivate the love of words. It is important to cultivate words, to select the right words, to put them in the right order, to know something of their meaning, of their association, of their sound. You know, it is a most fascinating world. Again take Shakespeare: "The *uncertain* glory of an April day". Nobody but a Shakespeare could have used the word "uncertain" to convey everything. Just think of it: "The

uncertain glory of an April day". It is perfect.

And if you examine your Shakespeare you will find that is what Shakespeare was. He was a word lover. He invented, of course, a great many of the words which have gone into our common speech, simply made them up, but he also used the words of Romeo to Juliet on the balcony: "O, speak again, *bright* angel". Think of the use of "bright"—"O speak again, bright angel". Think how he used that word "bright" in so many places: "So quick bright things come to confusions," and so on.

That love of words, that discrimination in the use of words, is all essential to the advocate. The presentation of your case in the appropriate language, in the inimitable language, is part of the art of persuasion; and persuasion is the whole end of it, as I understand it. The Bar is the source and guardian of the virtue of the bench. It is the good Bar that makes the good bench.

And therefore it is the greatest possible pleasure to feel I have spent my life at the Bar; and now when I sit upon the bench, with occasionally a strong yearning to get back into the arena, nothing gives me greater joy than to see the young advocate presenting his case to the very best of his ability—immature it may be, but with all the signs of promise. And if I find, as I do find, an advocate with a nice sense of words who presents the argument in an attractive form, my heart warms to the advocate and I do my best to encourage and to help him on his way.

(Continued from page 14)

to recommend, and the obligatory nature of its recommendations, have been regarded as vouchsafed by the Constitution of 1844, and the new Constitution continues the substance of this power in the judiciary. The power of discipline is now concentrated in the Supreme Court, instead of being scattered as formerly.

Appointment, Confirmation and Terms of Judges

With respect to the selection of judges, the new Constitution provides that all judges, except those of inferior Courts with jurisdiction limited to one municipality, shall be nominated and appointed by the Governor with the advice and consent of the Senate.[40] This retains unchanged the appointive system that has always been in effect in New Jersey for the judges of all the principal Courts except the Vice Chancellors and Advisory Masters of the Court of Chancery, who were appointed by the Chancellor alone.

A new provision is that no nomination to a judgeship on the Supreme, Superior or County Courts "shall be sent to the Senate for confirmation until after seven days' public notice by the Governor".[41] This was evidently intended as insurance against possible abuses of the appointing power, by giving the Bar and the public an opportunity to express their views about a nomination.

With respect to judicial tenure, some changes are made by the new Constitution. Under the Constitution of 1844, judges of constitutional Courts held office for specified terms, which in most instances were of seven years.[42] The Constitution of 1947 provides that "the Justices of the Supreme Court and the Judges of the Superior Court shall hold their offices for initial terms of seven years and upon re-appointment shall hold their offices during good behavior".[43]

Retirement, Impeachment and Removal of Judges

Heretofore New Jersey has had no provision for the compulsory retirement of judges on account of age. The new Constitution provides that the justices of the Supreme Court and the judges of the Superior Court shall be retired on pensions upon attaining the age of seventy years.[44] Compulsory retirement of County Court judges for age is not provided.

The Constitution of 1947 provides methods of terminating the service of Supreme Court justices, Superior

40. Const. 1947, Art. VI, Sec. VI, Par. 1.
41. Const. 1947, Art. VI, Sec. VI, Par. 1.
42. Const. 1844, Art. VII, Sec. II, Par. 1 (Chancellor and Supreme Court Justices—7 years); Art. VI, Sec. II, Pars. 1 and 2 (Court of Errors and Appeals Judges—6 years). By statute, 7-year terms are provided for Circuit Court Judges, R. S. 2:5-4, Vice Chancellors, R. S. 2:2-3, and Advisory Masters, R. S. 2:2-14.
43. Const. 1947, Art. VI, Sec. VI, Par. 3.
44. Const. 1947, Art. VI, Sec. VI, Par. 3.

Court judges and County Court judges, prior to the expiration of their terms of office. The first is the traditional remedy of impeachment by majority vote of the General Assembly (lower house of the Legislature) with conviction by a two-thirds vote of all members of the Senate.[45]

The second method applies when a judge has become physically incapacitated:[46]

> Whenever the Supreme Court shall certify to the Governor that it appears that any Justice of the Supreme Court, Judge of the Superior Court or Judge of the County Court is so incapacitated as substantially to prevent him from performing his judicial duties, the Governor shall appoint a commission of three persons to inquire into the circumstances; and, on their recommendation, the Governor may retire the Justice or Judge from office, on pension as may be provided by law.

In addition, the new Constitution provides that "the Judges of the Superior Court and the Judges of the County Courts shall also be subject to removal from office by the Supreme Court for such causes and in such manner as shall be provided by law."[47] The way is thus open for all judges, other than the Supreme Court justices, to be removed from office for conduct which, while insufficient to justify impeachment, nevertheless in the judgment of the Court of last resort does not measure up to proper standards of judicial administration. This should prevent a repetition of the situation which arose fifteen years ago when it was held that the Chancellor had no authority to remove a Vice Chancellor from office on account of irregularities in official conduct.[48] It is also in line with attempts to provide some fair method, short of impeachment, satisfactorily reconciling security of judicial tenure with responsibility for the highest standards of judicial performance, and would seem to authorize the enactment of a statute, such as that proposed in the Congress by former Representative Hatton W. Sumners and approved by the American Bar Association at its 1940 meeting[49] providing for trial before a Court of the issue of a judge's "good behavior" in a judicial sense.

Constitutional Requirement that Judges Shall Be Lawyers

It is a somewhat startling fact that heretofore there has been in New Jersey no constitutional requirement that any judge in any Court be a member of the Bar or learned in the law.[50] This defect has to some extent been corrected in the new Constitution, which provides that "the Justices of the Supreme Court, the Judges of the Superior Courts and the Judges of the County Courts, shall each, prior to his appointment, have been admitted to the practice of the law in this State for at least ten years."[51]

Incidentally, it will be observed that the Constitutional Convention side-stepped the controversy presently raging in New Jersey over the distinction between attorneys and counsellors. Ever since the promulgation of a rule by the Supreme Court in 1767, New Jersey has observed a distinction between attorneys at law and counsellors at law.[52] One may be admitted as a counsellor only after having practiced as an attorney for at least three years and passed a second examination.[53] Only counsellors at law have been permitted to appear before the Court of Errors and Appeals or the Supreme Court *en banc* or to sign a pleading in the Court of Chancery. The request for the abolition of the distinction between attorneys and counsellors was, after the submission of briefs and oral argument, taken under advisement by the Supreme Court on December 4, 1946, and, according to a recent announcement, will be turned over to the new Supreme Court for appropriate action.

In view of the changes to be made in the organization of the Courts under the new Constitution and the necessity of preparing rules of practice and rules for the administration of the Courts, it was provided that the judicial article shall not take effect until September 15, 1948, although the rest of the Constitution took effect on January 1, 1948.[54]

Important Tasks Have To Be Performed Before September 15

The efficacy of the thorough-going modernization of New Jersey's judicial structure and the constitutional provisions for adequate judicial and administrative powers will not be secured automatically or as a matter of course because of the adoption of the new Judicial Article. Many rules and a few statutes will be required to give form and vitality to the flexible provisions of the basic framework of a modern judicial system. Rules of all Courts will have to be revised and simplified, to bring them abreast of present-day thought and experience in New Jersey and other jurisdictions. A prodigious task has to be performed before next September 15, when the Judicial Article and the whole new judicial system will go into effect overnight.

Governor Driscoll, who championed the holding of the Constitutional Convention, advocated the new Judicial Article, and successfully urged the people of the State to approve and adopt the new Constitution, has appointed as Chief Justice of the new Supreme Court Arthur T. Vanderbilt, a former President of the American Bar Association, because of "his extraordinary experience as a lawyer, student of jurisprudence, judicial procedure, and judicial structure". Chief Justice Vanderbilt's experience in rule-making for federal Courts will be invaluable to his State. With the help and support of the judges and organized Bar of the State, he may lead the way to improvements in the administration of justice in New Jersey which will command interest and approval in other States.

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45. Const. 1947, Art. VI, Sec. VI, Par. 4; Art. VII, Sec. III, Par 2.
46. Const. 1947, Art. VI, Sec. VI, Par. 5.
47. Const. 1947, Art. VI, Sec. VI, Par. 4.
48. *In re New Jersey State Bar Association*, 114 N. J. Eq. 261; 168 Atl. 794.
49. 26 A. B. A. J. 383, 760.
50. *In re Hudson County*, 106 N. J. L. 62; 144 Atl. 169. By statute, certain judges are required to be members of the Bar; Vice Chancellors, R .S. 2:2-3; Advisory Masters, R. S. 2:2-13; Juvenile Court Judges, R. S. 9:18-5; Criminal District Court Judges, R. S. 2:212-6.
51. Const. 1947, Art. VI, Sec. VI, Par. 2.
52. *In re Branch, supra.*
53. Supreme Court Rule 7. See also, Gerhart: "Admission to the Bar: Survey of Present Requirements in the States," 33 A. B. A. J. 995, at 998; October, 1947.
54. Const. 1947, Art. XI, Sec. IV, Par. 14; Art. X, Par. 5.

Annual Survey of Law—III
(Continued from page 34)

(6) protection of business and labor rights, (7) fraud and mistake, (8) actions to quiet title, and (9) interpleader.

Under the first heading he comments on the hesitance of Courts in granting relief in cases of obvious giving away of corporate property, to the certain injury of stockholders and a general tendency not to interfere with corporate management except in extreme cases. Timidity in holding directors to their duties by preventive remedies and in use of the visitatorial powers of equity over corporations has brought about much of the extension of administrative regulation over every phase of corporate activity.

To look at some of the cases: The Michigan Court, where a long line of waiting customers of defendant's restaurant barred approach to plaintiff's store, gave relief by ordering defendant to line up the customers so as to cause a minimum of interference with plaintiff. The Arkansas Court denied an injunction to restrain a continuous use of insulting and scurrilous language and threats, holding that failure of the police to interfere did not give equity jurisdiction.[40] But this should not be put on the ground of a refusal of equity to restrain "interference with merely private personal rights, not involving injury to property or to rights of the community", but rather on the difficulty of enforcing such an injunction and likelihood of an inequitable or ineffectual decree. In Massachusetts the Court decreed in favor of a union specific performance of a contract of an employer to give effect to assignments of future wages to pay dues.[41] One Court is noted as still talking about "mutuality of remedy". Delaware has rejected the anomalous English doctrine as to disposition of the purchase money on exercise of an option to buy land after the vendor's death, thus adding one more to the American jurisdictions which have rejected that anomaly. Lastly, a good case is noted as relieving against forfeiture to the vendor where the purchaser in a land contract which made time of the essence, with loss of all prior payments, had paid about half of the purchase price, had possession for a number of years, had improved the property, and tendered the full amount with interest.[42] This is as it should be. The line of cases *contra* which developed in this country in the last century belonged to the era of treating specific performance as something by itself instead of on general equitable principles.

What Professor Walsh says about misconceiving the procedural fusion of law and equity deserves to be emphasized. A great demand of the time is for individualization in the application of law, and since the Seventeenth Century we have achieved individualization through equity. The spirit of our historical equity doctrine is a precious possession of Anglo-American law. We should be vigilant lest we forget and lose this, not the least of our legal inheritance.

A Competent Chapter on Real and Personal Property

The chapter on Real and Personal Property by Arad Riggs is exceptionally well done. The cases are well chosen and the comments are in point and well put. There is a suggestive observation as to forms: "The common law requirement of manual delivery of a deed may have been

40. *Smith* v. *Hamm*, 207 Ark. 507 (1944).
41. *Sanford* v. *Boston Edison Co.*, 316 Mass. 631 (1944).
42. *Yellowstone County* v. *Wight*, 145 Pac. (2d) 126 (Mont. 1944).

formalistic, but it was certain. The modern attempt to substitute the intention test has caused great uncertainty and a substantial amount of litigation." Mr. Sims' paper[43] taking exception to the *Restatement* as to running of the burden of covenants and an article on the controverted question of the assignability and divisibility of easements in gross are noted. The most interesting case reviewed is one where there was an agreement for separate ownership of a heavy platform scales substantially built into a commercial building. The question was whether the separate ownership could be asserted against a bona fide purchaser of the building who relied on the value of the scales when he bought. It was held that a secret agreement could not change a part of the realty into separately owned personalty as against a purchaser of the realty. Leases for the "duration of the war" revived an old controversy over the need of certainty as to length of the term in an estate for years. In England and in Illinois (which has always held strictly to the common law in such matters) these leases were held to create only tenancies at will.

An unusual number of cases on FUTURE INTERESTS were decided during the year; so much so that we are told that a course in the subject could be taught from them. Two may be noticed. Where a strip of land through a farm is conveyed to a railroad company in fee simple determinable, where the possibility of reverter is not alienable, on abandonment of the railroad the heirs of the grantor may recover the strip although the farm through which the strip runs has been conveyed to others. This undesirable result is avoided if the deed can be construed to create an easement. Massachusetts[44] departed from what Professor Leach calls the "fertile octogenarian" doctrine, and this is thought to be a possible beginning of overturning the classical view.

Under TRUSTS AND ADMINISTRATION, two decisions, one in Michigan and one in Pennsylvania, indicate a possible conflict between the *Restatement of Trusts* and the *Restatement of Property* where a testator leaves his residuary estate to his executor to dispose of as he deems best.

In the chapter on SUCCESSION AND ADMINISTRATION, we find that during the war a number of States enacted statutes clarifying the old rules as to informal wills of soldiers and sailors. There was the usual number of cases where statutory rules as to the requisites of execution were not observed. In particular, wills failed from the use of printed forms by inexpert draftsmen. It is noted that judicial decisions are encroaching on the statutory restrictions on the probate of lost wills. There was one unusual case of an heir murdering the ancestor.[45] The only son of a man who had killed his mother was not allowed to inherit. The Oregon statute disqualified the murderer but did not create a new heir. The grandson was not the heir of the deceased because his father was alive at decedent's death. On the same reasoning the collaterals were excluded, so the property passed to the State for want of heirs. This treats the murderer as an heir who could not take. But does not the statute simply eliminate him from the scheme of inheritance?

[THIRD INSTALLMENT IN A SERIES OF FOUR ARTICLES]

43. 30 *Cornell Law Quarterly* 1 (1944).
44. *Commissioner of Corporations* v. *Bullard*, 313 Mass. 72, 79 (1943).
45. *In re Norton's Estate*, 175 Ore. 115 (1944).

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Tenth Circuit	WILLIAM O. WILSON, Majestic Building, Cheyenne, Wyoming